TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 168.

ELIZABETH S. OVERBY, LEONORA H. PACE, KATE CULBERSON, PAUL BLECKLEY, LOGAN BLECKLEY, AND HARALSON BLECKLEY, PLAINTIFFS IN ERROR,

vs.

FANNIE H. GORDON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 9, 1898.

(17,214.)

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1 In the Court of Appeals of the District of Columbia.

ELIZABETH S. OVERBY ET AL., Appellants,
vs.
FANNIE H. GORDON. } No. 809.

Supreme Court of the District of Columbia.

In the Matter of the Last Will and Testament of HUGH A. HARALSON. No. 39956. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

SAVANNAH, GA., *Aug.* 14, 1895.

It is my will and desire that after my death the interest on my bonds be for the sole use and benefit of my sister Mrs. Fannie Gordon and that after her death the interest on my bonds be for the sole use and benefit of her daughter and my niece Carrie Lewis Gordon.

It is my will and desire that none of my securities be sold or the investment changed until they mature.

If Carrie Lewis Gordon should have no children at her death these securities with the residue of my estate to be divided to my heirs-at-law.

HUGH A. HARALSON.

Witness:
CHAS. A. MACATEE.

Form 30.

DISTRICT OF COLUMBIA, *To wit:*

On the 15th day of November, 1895, came Levi Maish and made oath on the Holy Evangels of almighty God that he does not know of any will or codicil of Hugh A. Haralson, late of said District, deceased, other than the aforegoing instrument of writing dated August 14, 1895, and that he received the same from Burton Smith, Esq., by mail, and said Hugh A. Haralson died on or about the — day of August, 1895.

LEVI MAISH.

2 Sworn to and subscribed before me—

M. J. GRIFFITH,
[SEAL.] *Notary Public for the District of Columbia.*

Form 14.

DISTRICT OF COLUMBIA, *To wit:*

The United States of America to W. W. Gordon, Jr., of Savannah, Georgia, Greeting:

Having full faith in your prudence and competency, we have appointed you commissioner, and by these presents do authorize you to examine Chas. A. Macatee, represented to be at present residing in Savannah, Georgia, as a witness in the matter of proving the last will and testament of Hugh A. Haralson, late of the District of Columbia, deceased, which hath been exhibited for probate to the supreme court of the District of Columbia, in support of the proof of said will, on oath, upon the interrogatories annexed to this commission, to take and certify the depositions of the said witness and return the same to the supreme court of the District of Columbia aforesaid, addressed to the register of wills, Washington, D. C.

Witness Alexander B. Hagner, justice holding the special term of the said supreme court for orphans' court business, this
[SEAL.] 27th day of February, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

Test: J. NOTA McGILL,
Register of Wills for the District of Columbia.

Interrogatories to be administered to Chas. A. Macatee, represented to be at present residing in Savannah, Georgia, witness in the matter of proving the last will and testament of Hugh A. Haralson, late of the District of Columbia, deceased, now pending before the supreme court of the District of Columbia, under and in pursuance of the commission hereto annexed.

First interrogatory. What is your name, age and occupation, business or profession, and where do you reside?

Second interrogatory. Look at the instrument of writing hereto annexed, bearing date the 14th day of August, in the year of our Lord one thousand eight hundred and ninety-five, purporting to be the last will and testament of Hugh A. Haralson, late of the District of Columbia, deceased, and say whether or not you were present as a witness at the time of the execution of the same. Did you see the said Hugh A. Haralson sign said will?

Third interrogatory. Did the said Hugh A. Haralson publish, pronounce, and declare the same to be his last will and testament?

Fourth interrogatory. Was he at the time of so doing, to the best of your apprehension, of sound and disposing mind and capable of executing a valid deed or contract?

Fifth interrogatory. Did you sign your name as a witness
3 to said will in the presence and at the request of the said Hugh A. Haralson?

(NOTE.—Commissioners must not in any way mark any will or codicil, nor attach any paper thereto.)

In the Supreme Court of the District of Columbia.

In the Matter of Proving the Last Will and Testament of HUGH A. HARALSON.

STATE OF GEORGIA, }
Chatham County. }

Be it remembered that at an examination of a witness, begun and held on the 29th day of February, 1896, and continued from time to time by me until the 29th day of Feb'y, 1896, when the within depositions were taken, I, William W. Gordon, Jr., of said county and State, did cause Chas. A. Macatee, a material witness, to be present at room 10, Merchants' Bank building, Savannah, Georgia, to testify on the part and behalf of the (propounders of said will) in a certain cause now pending in the supreme court of the District of Columbia, at the special term thereof for the holding of orphans' court business, wherein the cause at issue is "In the matter of proving the last will and testament of Hugh A. Haralson."

CHAS. A. MACATEE, of the age of 48 years, a witness for (the propounders of the will), being produced, sworn, and examined, deposeth and saith:

To the first interrogatory he answers:
Name, Chas. A. Macatee; age, 48 years; occupation, special agent United States Treasury Department. I reside temporarily in Savannah.

To the second interrogatory he answers:
I was present as a witness at the time of the execution of the instrument in writing hereto annexed, bearing date the 14th day of August, 1895, purporting to be the last will and testament of Hugh A. Haralson. I did see the said Haralson sign said will.

To the third interrogatory he answers:
He did publish, pronounce, and declare the same to be his last will and testament, and wrote and signed the same with his own hand in my presence.

To the fourth interrogatory he answers:
I think so; perfectly so.

To the fifth interrogatory he answers:
I did sign this instrument in writing, as a witness to said will, in the presence and at the request of the said Hugh A. Haralson.

CHAS. A. MACATEE.

4 STATE OF GEORGIA, }
Chatham County. }

I, W. W. Gordon, Jr., the commissioner duly appointed under date Feb'y 27th, 1896, to take the testimony of Chas. A. Macatee, for use as evidence in the matter of proving the last will and testament of Hugh A. Haralson, at the special term of the supreme court of the District of Columbia for orphans' court business, do hereby certify that in pursuance of the annexed commission the foregoing

depositions *were* taken down by me and reduced to writing in the presence of and for the statement of the witness at the time and place designated in the caption thereof, and *were* then and there by me read over to the witness and by him subscribed in my presence, who was then and there attending, the witness having been by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause. I further certify that I am not of counsel for any of the parties to said cause or in any manner interested therein.

WM. W. GORDON, JR., [SEAL.]
Commissioner to Take the Testimony of Chas. A. Macatee.

Petition. Filed January 23, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Last Will and Testament of HUGH A. HARALSON. No. 6967.

The petition of Fanny H. Gordon respectfully represents as follows:

1. She is a citizen of the United States and of the State of Georgia, but is temporarily resident in the District of Columbia with her husband, John B. Gordon, a Senator of the United States from the said State, and will be so resident for the greater part of the time until and including at least the fourth day of March, A. D. 1897.

2. The above-named Hugh A. Haralson, though a citizen of the State of Georgia, was at the time of his death, and for several years prior thereto had been, a resident of the District of Columbia, and the said Haralson died on the 23rd day of August, A. D. 1895, at the village of Kirkwood, in the county of De Kalb, State of Georgia, in which State he temporarily was in the discharge of his duties as an official of the Government of the United States.

3. The said Haralson at the time of his death was possessed of a personal estate consisting chiefly of bonds and stocks, and of the value of about ten thousand dollars ($10,000), all of which, except an insignificant part thereof, was at the time of his death situate in the District of Columbia.

5 1.

4. The said Haralson on, to wit, the 14th day of August, A. D. 1895, made, published, and declared in due form of law, as and for his last will and testament, a paper-writing now on file in the office of the register of wills of the District of Columbia, which is hereby referred to and prayed to be taken as part hereof.

5. In and by the said paper-writing the said Haralson named no person as the executor thereof, but therein and thereby he left his entire estate to the petitioner for life, with remainder to her daughter, Caroline L. Gordon, and in case the said Caroline L. Gordon should die without issue, then to his next of kin at law.

6. The said Haralson left surviving him as his said next of kin the following persons, namely: (1) a sister, Elizabeth S. Overby, widow of Basil H. Overby, resident in the city of Philadelphia, State of Pennsylvania; (2) a sister, the petitioner; (3) a sister, Leonora H. Pace, wife of James M. Pace, resident in the city of Covington, State of Georgia; and (4) Kate Culberson, wife of Hubert Culberson; (5) Paul Bleckley, (6) Logan Bleckley, and (7) Haralson Bleckley, all of the last four named being the children of a deceased sister, Caroline C. Bleckley, and resident in the city of Atlanta, State of Georgia.

7. The said Elizabeth S. Overby was the eldest sister of the said Haralson, and the petitioner is his sister next in seniority in point of age, and is upwards of twenty-one (21) years of age, and the said Elizabeth S. Overby and Leonora H. Pace are non-residents of the District of Columbia.

2.

and liable to continue such throughout the period necessary to be and that will be occupied in the administration of the estate of the said Haralson.

8. The petitioner has an adult son, Hugh H. Gordon, an attorney and counsellor at law, resident and practicing his profession in the District of Columbia, who is the eldest person of all the nephews and nieces of the said Haralson.

The premises considered, the petitioner therefore prays:

First. That the paper-writing aforesaid may be duly admitted to probate and record as the last will and testament of the said Haralson, and that to that end all necessary citations may issue and proceedings be had.

Secondly. That letters of administration with the will annexed may be granted on the estate of the said Haralson to the petitioner or her said son or to both, or to some other proper person, according to the form of the statute in such case made and provided; and,

Thirdly. That the petitioner may have such other and further relief in the premises as the nature of the case may require.

FANNY H. GORDON.

HENRY E. DAVIS,
LEVI MAISH,
Proctors for Petitioner.

6 DISTRICT OF COLUMBIA, *ss*:

Before me, a notary public in and for the District aforesaid, personally appeared Fanny H. Gordon, who, being first duly sworn, deposes and says that she has heard read

3.

the foregoing petition by her subscribed, and knows the contents thereof, and that the statements therein made of her own knowledge are true and those made on her information and belief she believes to be true.

FANNY H. GORDON.

Subscribed and sworn to before me this 7th day of January, A. D. 1896.

[SEAL.] FRANK B. MARLOW,
Notary Public D. C.

Caveat. Filed March 6, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Last Will and Testament of HUGH A. HARALSON, Deceased.

A paper-writing bearing date August 14, 1895, purporting to be the last will and testament of Hugh A. Haralson, deceased, having been propounded for probate before said court as such last will and testament, the undersigned, [as attorneys for]* Elizabeth S. Overby, Leonora H. Pace, wife of James M. Pace; Kate Culberson, wife of Hubert Culberson; Paul Bleckley, Logan Bleckley, and Haralson Bleckley, the next of kin of said deceased, other than Fanny H. Gordon, the petitioner for the probate aforesaid and named as such in the said petition, do hereby contest the said probate and the validity of the said paper-writing so purporting to be such last will and testament, and for that purpose allege against the validity of such alleged will as follows:

First. That the said paper-writing is not the last will and testament of the said deceased.

Second. That the said deceased was not at the time of his death a resident of the District of Columbia; and,

Third. That at the time of his death the said deceased was a citizen and resident of the State of Georgia.

LOGAN BLECKLEY.
HARALSON BLECKLEY.
PAUL BLECKLEY.
KATE CULBERSON.
LEONORA H. PACE.

Signed by each of the subscribers in presence of—
C. B. REYNOLDS,
[SEAL.] *Notary Public, Fulton Co., Ga.*

7 *Issues. Filed April* 10, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of HUGH A. HARALSON, Deceased.
No. 6967.

Upon consideration of the caveat in the above-entitled cause, it is this 10th day of April, A. D. 1896, ordered that the following issues be tried by the court, sitting as a circuit court, and a jury, namely:

[* Words enclosed in brackets erased in copy.]

1. Was the said deceased at the time of his death a resident of the District of Columbia?

2. Was the said deceased at the time of his death a citizen and resident of the State of Georgia?

3. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament a resident of the District of Columbia?

4. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament a citizen and resident of the State of Georgia?

5. At the time of his death did any considerable part of the personal estate of the said deceased lie within the District of Columbia?

A. B. HAGNER,
Asso. Justice.

Findings of Jury. Filed April 1, 1898.

Supreme Court of the District of Columbia.

THURSDAY, *February* 10, 1898.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

FANNIE H. GORDON, Caveatee, Pl'ff, *v.* ELIZABETH S. OVERBY, LEONORA H. PACE, Kate Culberson, Paul Bleckley, Logan Bleckley, Haralson Bleckley, Caveators, Defendants.	At Law.	No. 39956.

Come here again the parties aforesaid, in manner aforesaid, and the same jury respited yesterday, who, after the case is given them in charge, on their oath say, in answer to the first issue: "1. Was the said deceased at the time of his death a resident of the District of Columbia?" they answer, Yes. In answer to the second issue: "2. Was the said deceased at the time of his death a citizen and resident of the State of Georgia?" they answer, No. In answer to the third issue: "3. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament a resident of the District of Columbia?" they answer, Yes. In answer to the fourth issue: "4. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament a citizen and resident of the State of Georgia?" they answer, No. In answer to the fifth issue: "5. At the time of his death did any considerable part of the personal estate of the said deceased lie within the District of Columbia?" they answer, Yes.

And the court orders said answers certified to that branch of the court whence said issues came.

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing is a true copy of the answers of the jury to the issues in the above-entitled cause.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 1st day of April, A. D. 1898.

[SEAL.]

JOHN R. YOUNG, *Clerk.*

Order. Filed April 22nd, 1898.

In the Supreme Court of the District of Columbia, Holding an Orphans' Court for said District.

In the Matter of HUGH A. HARALSON, Deceased. No. 6967.

Upon consideration of the petition of Fanny H. Gordon, filed January 23, 1896, for the admission to probate and record of the last will and testament of Hugh A. Haralson, deceased, and of the verdict of the jury upon the issues framed upon the caveat of Logan Bleckley, Haralson Bleckley, Paul Bleckley, Kate Culberson, and Le-nora H. Pace, which said caveat was filed March 6, 1896, and which said issues were duly certified by the clerk of this court April 1, 1898, and the said last will and testament having been duly proved by the testimony of the subscribing witness thereto, it is this 22d day of April, 1898, adjudged, ordered, and decreed that the said will be, and the same is hereby, admitted to probate and record as the last will and testament of the personal estate of said decedent; and it further appearing to the court that no executor is named in said will, it is further adjudged, ordered, and decreed that letters of administration *cum testamento annexo* on said estate be, and the same are hereby, granted to Hugh H. Gordon upon his giving a bond in the penalty of five hundred dollars ($500), conditioned for paying all debts, claims, and damages which shall be recovered against him as administrator.

A. B. HAGNER,
Asso. Justice.

9 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

FANNY H. GORDON, Plaintiff and Caveatee,
vs.
ELIZABETH S. OVERBY, LEONORA H. PACE, Kate Culberson, *et al.* } At Law. # 39956.

In the matter of the estate of Hugh A. Haralson, deceased.

Appeal.

Now comes the above-named caveators and defendants and appeal to the Court of Appeals of the District of Columbia from the order

entered herein on the 22d day of April, 1898, admitting the alleged will of Hugh A. Haralson to probate and record.

PHILLIPS & McKENNEY,
For Caveators.

April 29th, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

FANNY H. GORDON, Plaintiff and Caveatee, *vs.* ELIZABETH S. OVERBY, LEONORA H. PACE, Kate Culberson, Logan Bleckley, Haralson Bleckley, and Paul Bleckley, Defendants and Caveators.	At Law. # 39956.

In the matter of the estate of Hugh A. Haralson, deceased.

Now comes the above-named plaintiff and caveatee and, being advised of the appeal by the caveators to the Court of Appeals of the District of Columbia from the order entered herein on the 22d day of April, A. D. 1898, admitting the will of Hugh A. Haralson, deceased, to probate, waives service of citation and appeal bond on such appeal.

DAVIS & TUCKER,
Attorneys for Caveators.

Form 41.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

I, J. Nota McGill, register of wills for the District of Columbia and *ex officio* clerk of the said special term for orphans' court business, do hereby certify the foregoing to be a true copy of the original will of Hugh A. Haralson, deceased, and the probate thereto, filed and recorded in the office of the register of wills for the District of Columbia aforesaid; also a true copy of petition, filed January 23, 1896; caveat, filed March 6, 1896; issues, filed April 10, 1896; findings of jury, filed April 1st, 1898; order of court, filed April 22, 1898, and appeal and waiver of citation on appeal, filed April 29th, 1898.

And I further certify that the said will, after having been proven by the witness whose name appears in the foregoing probate, was by the order of the supreme court of the District of Columbia, holding a special term for orphans' court business, duly admitted to probate and record on the 22nd day of April, A. D. one thousand eight hundred and ninety-eight.

Seal Supreme Court of the District of Columbia, Probate Jurisdiction.

In testimony whereof I hereunto subscribe my name and affix the seal of the said supreme court, special term for orphans' court business, this 3rd day of May, anno Domini 1898.

J. NOTA McGILL.

Supreme Court of the District of Columbia.

SATURDAY, *March* 12, 1898.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

In re Estate of HUGH A. HARALSON. At Law. No. 39956.

Upon hearing the caveators' motion for a new trial, it is considered that the same be, and hereby is, overruled.

In re Estate of HUGH A. HARALSON. At Law. No. 39956.

Now come here again the caveators, by their attorneys, and present to the court here their bill of exceptions taken during the trial of the cause, and pray that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

In the Supreme Court of the District of Columbia.

FANNY H. GORDON, Caveatee and Plaintiff,
vs.
ELIZABETH S. OVERBY, LEONORA H. PACE, Kate Culberson, Logan Bleckley, Haralson Bleckley, and Paul Bleckley, Caveators and Defendants. } At Law. # 39956.

In the matter of the estate of Hugh A. Haralson. Issues from probate court.

Bill of Exceptions.

Be it remembered that this cause came on to be heard on the 8th day of February, A. D. 1898, before Mr. Justice Cole and a jury, and thereupon, and before the said jury had been empaneled and sworn, counsel for the caveatee, Fanny H. Gordon, moved the court
11 to align the parties to the issues, and thereupon the court, against the protest of counsel for the caveators, assigned the propounder of the will and caveatee, Fanny H. Gordon, the position of plaintiff, and the caveators, Elizabeth S. Overby, Leonora H. Pace, Kate Culberson, Logan Bleckley, Haralson Bleckley, and Paul Bleckley, the position of defendants, and at the same time ruled that the said plaintiff should lead in the introduction of proof and should have the right to open and close to the jury; to which assignment and rulings the caveators, by their counsel, then and there excepted, and such exception was noted by the trial justice upon his minutes.

And thereupon, the said jury having been duly empaneled and sworn, the said Fanny H. Gordon, to sustain the issues on her part joined, introduced evidence tending to show that from 1865 to the present time she has been a citizen and resident of De Kalb county, in the State of Georgia, and that both at the date of the testamentary paper in controversy and at the date of his death the said Hugh A. Haralson was a resident of the District of Columbia; and

it having been admitted by counsel for the caveators that at the said last-mentioned date there was on deposit in the National Bank of the Republic and in the Washington Loan & Trust Company, both situate in the District of Columbia, money and securities approximating nine thousand dollars ($9,000.00) in amount and value, and that said money and securities, which constituted the entire estate of the decedent, with the exception of about two hundred dollars ($200.00) found outside of the District of Columbia, were subsequently removed from the said District by Logan Bleckley, Esquire, claiming to act as administrator of the estate of said Hugh A. Haralson, deceased, under grant of letters issued by the Georgia court, the plaintiff rested.

And thereupon the defendants (caveators), to sustain the issues upon their part joined, offered in evidence the following certified transcript of record from the De Kalb court of ordinary, De Kalb county, in the State of Georgia:

STATE OF GEORGIA,
De Kalb County.

The petition of Logan Bleckley, a citizen of the United States, residing in said State, showeth that Hugh A. Haralson departed this life on or about the 23 day of August, 1895, a resident of said county, intestate, leaving an estate, undivised, of real and personal property of the probable value of ten thousand dollars, and that under the law it is necessary that said estate should be administered; that petitioner is one of the next of kin and heir-at-law of the said Hugh A. Haralson.

Wherefore petitioner prays an order directing that citation be issued herein and published, as the law requires, and that if no good cause can be shown to the contrary, your petitioner be appointed administrator of the estate of said deceased.

LOGAN BLECKLEY.

12 DE KALB COURT OF ORDINARY,
AT CHAMBERS, *April 6th*, 1896.

Upon reading the foregoing petition, it is ordered that citation therein be issued and published as required by law.

W. M. RAGSDALE, *Ordinary.*

De Kalb Court of Ordinary, May Term, 1896.

The petition of Logan Bleckley for letters of administration on the estate of Hugh A. Haralson, deceased, having been duly filed, and it appearing that citation therein was issued and published according to law, requiring all concerned to appear at this term and show cause, if any they could, why said letters should not be granted; and it also appearing that said deceased died a resident of said county, intestate, and that said applicant is a citizen of this State and lawfully qualified for said administration, and no objection being offered thereto, it is therefore ordered by the court that the said Logan Bleckley be, and he is hereby, appointed adminis-

trator on the estate of said deceased, and that letters issue to him as such, upon his giving bond, with approved security, in the sum of twenty thousand dollars, and taking and subscribing the oath as provided by law.

W. M. RAGSDALE, *Ordinary.*

GEORGIA, }
De Kalb County. }

I, Logan Bleckley, do solemnly swear that Hugh A. Haralson died intestate, so far as I know or believe, and that I will well and truly administer on all of the estate of the said deceased and disburse the same as the law requires, and discharge to the best of my ability all my duties as administrator on the estate of said deceased, so help me God.

LOGAN BLECKLEY.

Sworn to and subscribed before me 4th day of May, 1896.

W. M. RAGSDALE, *Ordinary.*

GEORGIA, }
De Kalb County. }

To W. M. Ragsdale, ordinary of said county:

We, the undersigned, relatives of Hugh A. Haralson, deceased, being of full age and having an interest in said estate as distributees thereof, hereby select Logan Bleckley as our choice to administer upon the estate of said Hugh A. Haralson, deceased, this 1st day of May, 1896.

KATHERINE BLECKLEY CULBERSON.
PAUL BLECKLEY.

COVINGTON, GA., *May 4th*, 1896.

To the ordinary of De Kalb county:

I am a sister of Hugh A. Haralson, deceased, late of said county, and request the appointment of Logan Bleckley, of Fulton
13 county, Georgia, as administrator of the estate of said Hugh A. Haralson, deceased.

MRS. LEONORA H. PACE.

GEORGIA, }
De Kalb County. }

Know all men by these presents that we, Logan Bleckley, as principal, and H. L. Culberson, J. M. Pace, and Paul Bleckley, as securities, are held and firmly bound and obliged unto the honorable the ordinary of said county for the time being, and his successors in office, in the sum of twenty thousand dollars, to be paid to the said ordinary, his successors in office or assigns; for which payment, well and truly to be made and done, we bind ourselves, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated at Decatur, Ga., the 4th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

The condition of the above obligation is such that if the above-bound Logan Bleckley, administrator of the goods, chattels, and credits of Hugh A. Haralson, deceased, do make a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased which have or shall come to the hands, possession, or knowledge of the said Logan Bleckley or in the hands or possession of any other person or persons for him, and the same so made to exhibit in the court of ordinary of said county when he shall be thereunto required, and such goods, chattels, and credits do well and truly administer according to law, and make a just and true account of his actings and doings therein when required by the superior court or the ordinary for said county, and all the rest of the goods, chattels, and credits which shall be found remaining upon the account of the said administration, the same being first allowed by the said court, shall deliver and pay to such persons respectively as are entitled to the same by law; and if it shall hereafter appear that any last will and testament was made by the said deceased and the same be proved before the court and the executors obtain a certificate of the probate thereof, and the said Logan Bleckley do in such case, if required, render and deliver up the said letters of administration, then this obligation to be void; else to remain in full force.

LOGAN BLECKLEY. [L. S.]
H. L. CULBERSON. [L. S.]
J. M. PACE. [L. S.]
PAUL BLECKLEY. [L. S.]

Signed, sealed, and delivered in presence of—
W. M. RAGSDALE, *Ordinary.*

Approved:
W. M. RAGSDALE, *Ordinary.*

14 STATE OF GEORGIA, *De Kalb County.*

Court of Ordinary of said County.

I, W. M. Ragsdale, clerk of the court of ordinary of said county and State, the same being a court of record, hereby certify that the foregoing four pages of partly written and partly printed paper contain a full and exact copy of the original record of said case of file in the office of said court of ordinary.

Witness my official signature and the seal of said court this 6th day of December, 1897.

W. M. RAGSDALE,
Clerk Court of Ordinary.

STATE OF GEORGIA, *De Kalb County.*

Court of Ordinary of said County.

I, W. M. Ragsdale, ordinary of said county and State and presiding judge of the court thereof, the same being a court of record,

hereby certify that the clerk whose name appears to the foregoing certificate is the clerk of said court, and that the foregoing certificate and attestation is in due form.

Witness my official signature and the seal of said court this 6th day of December, 1897.

[SEAL.] W. M. RAGSDALE, *Ordinary.*

as tending to show that the said Hugh A. Haralson had died a resident of said county, intestate, and that the said caveatee was thereby estopped to deny that fact; but the trial justice refused to admit said record in evidence; to which ruling counsel for the caveators then and there excepted, and the exception was noted by the trial justice on his minutes.

And thereupon the caveators, defendants, rested. And because the matters and things aforesaid, as well as the rulings of the trial justice and the exceptions of the respective counsel thereto, would not otherwise appear of record, this bill of exceptions is settled and signed this 12 day of March, A. D. 1898.

CHAS. C. COLE,
Asso. Justice.

Settled by consent March 12, 1898.

PHILLIPS & McKENNEY,
Attorneys for Caveators.
DAVIS & TUCKER,
Attorneys for Caveatee.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } *ss:*
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 28, exclusive, are true copies of originals in cause No. 39956, at law, in the matter of the last will and testament of Hugh A. Haralson, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 10th day of May, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 809. Elizabeth S. Overby *et al.*, appellants, *vs.* Fannie H. Gordon. Court of Appeals, District of Columbia. Filed May 11, 1898. Robert Willett, clerk.

16 TUESDAY, *October 4th, A. D.* 1898.

ELIZABETH S. OVERBY, LEONORA H. PACE, KATE CULberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, Appellants,
vs.
FANNIE H. GORDON. } No. 809.

The argument in the above-entitled cause was commenced by Mr. S. F. Phillips, attorney for the appellants, and was continued by Messrs. C. C. Tucker and Henry E. Davis, attorneys for the appellee, and was concluded by Mr. F. D. McKenney, attorney for the appellants.

17 ELIZABETH S. OVERBY, LEONORA H. PACE, KATE Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, Appellants,
vs.
FANNIE H. GORDON. } No. 809.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from an order of the supreme court of the District of Columbia, holding a special term of that court for orphans' court business, whereby a certain paper-writing was therein admitted to probate as the last will and testament of one Hugh A. Haralson, deceased, and letters of administration with the will annexed, there having been no executor named therein, were ordered to be issued to Hugh H. Gordon.

It appears from the record that Hugh A. Haralson, a citizen of the State of Georgia, but claimed by the appellee to have been at the time of his death a resident of the District of Columbia, died on August 23, 1895, at Kirkwood, De Kalb county, in the State of Georgia, where he was staying temporarily as an official in
18 the service of the United States; and that on August 14, 1895, nine days before his death, he had executed an instrument of writing purporting to be his last will and testament, by the terms of which he bequeathed to his sister, Mrs. Fannie H. Gordon, the appellee in this case, for life, and after her death to her daughter, Carrie Lewis Gordon, his niece, the interest on his bonds, which are not otherwise described or identified in the writing, with remainder over to his heirs-at-law in the event that Carrie Lewis Gordon should have no children at her death. This paper-writing was attested by only one witness; while it appears that to make a testamentary paper effective as a will either of real or personal property in the State of Georgia two attesting witnesses are required, although in the District of Columbia, as the law now stands, it is not required that any witness should attach his signature to the paper to give it validity as a disposition of personal property. And it is this difference in the laws of the State of Georgia and of the District of Columbia that has given rise to the present controversy. The appellants claim that Hugh A. Haralson, the deceased, was at

the time of his death a resident of the State of Georgia, and that he died intestate; and on the other hand the appellee contends that the deceased, at the time of his death, although a citizen of Georgia, was a resident of the District of Columbia, and that the will was valid here.

The bonds referred to in the paper, which were of the value of about $9,000, were, at the time of Haralson's death, on deposit with two banking institutions in this city of Washington; and they constituted almost the whole estate left by the deceased, the residue of the estate amounting only to about $200. Where this residue was situated, or whether it was realty or personalty, does not appear. Only the fact appears that it was situated outside of the District of Columbia.

The will was filed in the office of the register of wills for this District; and on January 23, 1896, Mrs. Fannie H. Gordon, the legatee for life named in it, filed her petition in the supreme court of the District, holding a special term for orphans' court business, praying for its admission to probate, and the granting of letters of administration therewith to her son, Hugh H. Gordon, a resident of this District. Upon this petition a citation was issued to the next of kin to appear and show cause, if any they had, why the prayer of the petition should not be granted; and in pursuance of this citation, the appellants, who, with the appellee, constitute the next of kin of the deceased, appeared and filed a caveat to the alleged will, and averred that the paper-writing in question was not the last will and testament of the deceased, and that at the time of his death Hugh A. Haralson was a resident of the State of Georgia, and not of the District of Columbia, and that therefore the alleged will was of no validity in law.

Issues were thereupon framed between the parties; and on April 10, 1896, an order was made transmitting these issues to the circuit court branch of the supreme court of the District, for trial by jury according to law. The issues were five in number, and were as follows:

"1. Was the said deceased at the time of his death a resident of the District of Columbia?

"2. Was the said deceased at the time of his death a citizen and resident of the State of Georgia?

"3. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament, a resident of the District of Columbia?

"4. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament, a citizen and resident of the State of Georgia?

"5. At the time of his death did any considerable part of the personal estate of the said deceased lie within the District of Columbia?"

After an unexplained delay of nearly two years, trial of these issues was had; and on February 10, 1898, the jury rendered its verdict, wherein the first, third and fifth issues were answered in the affirmative, and the second and fourth in the negative; that is,

the jury found that the deceased, Hugh A. Haralson, both at the time of the making of the alleged will and at the time of his death, was a resident of the District of Columbia and not of the State of Georgia; and that at the time of his death there was a considerable part of his personal estate lying within the District of Columbia.

The findings of the jury upon the issues were duly certified to the special term of the court; and that court then directed proof to be taken of the execution of the will. This was done by the taking of the deposition of the subscribing witness. Upon the return of this deposition, the court rendered an order admitting the paper-writing to probate and record as the last will and testament of Hugh A. Haralson, and directing the issue to Hugh H. Gordon, of letters of administration upon his estate with the will annexed; and from this order the caveators have appealed, in pursuance of exceptions taken by them to rulings of the trial court at the trial of the issues before the jury.

There were two of these exceptions. The first of them was to the ruling of the court upon the alignment, as it is called, of the parties at the trial, the position of plaintiff, with the right to open and close the case, having been assigned to the caveatee, and the position of defendants to the caveators. Upon this ruling the first assignment of error by the appellants is based.

A second assignment of error, and that principally relied upon by the appellants, is founded upon a ruling of the trial court whereby certain record testimony offered in evidence by the caveators was excluded from consideration by the jury. This excluded testimony consisted of the record of certain proceedings had in the court of the ordinary, which is the court of probate, of De Kalb county, in the State of Georgia, in the months of April and May, 1896.

It appeared that, on April 6, 1896, one month after the appellants had filed their caveat in this District, and four days only before the order was made for the transmission of the issues joined between the parties to be tried before the jury, Logan Bleckley, one of the caveators, and one of the appellants here, had filed a petition in the court of the ordinary in De Kalb county, in the State of Georgia, wherein he had stated that Hugh A. Haralson had died in that county on August 23, 1895, a resident of the county and in-

19 testate, leaving an estate of real and personal property of the probable value of about $10,000, and asked that he, as one of the next of kin, should be appointed administrator of the estate. No mention was made of the alleged will, or of the proceedings pending in the District of Columbia, or of the controversy between the parties as to the place of residence of the deceased and the validity of the will, or of the *situs* or character of the property; nor was it mentioned who were the next of kin. Upon the petition the ordinary ordered a citation to issue "according to law;" but what publication of it was made we are not advised by the record. We understand, however, from the statements of counsel in their arguments, that the citation was published in some newspaper of limited circulation; and it seems to be conceded that the appellee in this

case had no notice or knowledge whatever of it or of any of the proceedings in the court of the ordinary; and all the proceedings evidently were *ex parte* proceedings. Thereupon, and on or before May 4, 1896, and within one month after the filing of the petition, the ordinary made an order, reciting the filing of the petition, and the issue and publication thereof according to law, and also that it appeared that the deceased had died a resident of the county and intestate, and that the applicant was duly qualified for the administration of his estate; and thereupon directing that letters of administration be issued to him, no objection having been offered thereto.

At the trial of the issues in the supreme court of this District, after the appellee as plaintiff had adduced her *prima facie* proof in support of her side of the issues, and had also proved that, subsequently to the date of his appointment as administrator in Georgia, the appellant, Logan Bleckley, under his claim as such administrator, had removed the bonds left by the deceased from this District, the appellants, to sustain their side of the issues, offered in evidence the record, duly authenticated, of the proceedings had in the court of the ordinary in Georgia, as we have here stated them; and they neither adduced nor offered to adduce any other testimony. This record was offered in evidence "as tending to show that the said Hugh A. Haralson had died a resident of said county (of De Kalb) intestate, and that said caveatee was thereby estopped to deny that fact." But the trial court refused to admit it; and the caveators excepted. And this is the basis for the second assignment of error.

1. With reference to the first assignment of error founded upon the ruling of the trial court in the arrangement of the parties, as plaintiff and defendants, respectively, it appears that there are cases in Maryland and elsewhere, in which the ruling of a trial court in the arrangement or alignment of parties as plaintiffs and defendants, in respect of issues sent from a probate court, has been made the subject of exception, and has been assigned as error and reviewed in an appellate tribunal; but that matter has been settled for us by repeated decisions of the Supreme Court of the United States, which have held that the ruling of a trial court on the question as to who should open and close a case is merely upon a matter of practice not proper to be made the subject of exception or to be reviewed upon writ of error. Lancaster *v.* Collins, 115 U. S., 222; Hall *v.* Weare, 92 U. S., 728; Day *v.* Woodworth, 13 How., 363, 370.

But even if the question were an open one, and we were not governed by these controlling authorities, we would have to hold that the contention of the appellants in this regard is untenable. The issues before the jury, while their determination would ultimately have affected the question of the validity or invalidity of the will of Hugh A. Haralson, were addressed merely to the determination of certain preliminary questions; and neither the validity of the will nor its execution was in issue. In fact, the will itself did not figure in any manner in the proceedings before the jury. The questions propounded to the jury in the issues were really only two; whether

Haralson at the time of his death was a resident of the District of Columbia, and whether at the time of his death, any considerable part of his personal estate lay within this District. The issues respecting his residence in the State of Georgia merely presented the negative of the other propositions, and might, in fact, have been entirely eliminated. Now, upon the main issues, it is too clear for any reasonable doubt that the burden of proving the affirmative was upon the appellee; and, therefore, it necessarily follows that she had the right to be made plaintiff and to open and close the case. There was no error in the ruling of the trial court in that regard.

2. But it is upon the second assignment of error that the appellants principally rely. And here they argue with great learning, force and ingenuity, that, by the refusal of the trial court to admit in evidence the record from the court of the ordinary in Georgia, they have been denied a right guaranteed to them by the Constitution of the United States in the provision that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." The contention demands our most serious consideration.

The record of the Georgia court, it may be recalled, was offered as an estoppel upon the appellee to conclude her from denying that the deceased Haralson was a resident of the State of Georgia at the time of his death and that he had died intestate. Now, if that record operated as an estoppel, there was nothing for the trial court to do, but to direct the jury to return a verdict in favor of the caveators on the issues, and nothing for the jury to do but to return such a verdict. The estoppel would have been conclusive of the whole controversy. And such in fact must have been the result, if the record is admissible at all In the case of The Southern Pacific Railroad Co. *v.* United States, 168 U. S., 1, the Supreme Court of the United States, after much consideration of all the authorities, by Mr. Justice Harlan said:

"There are some cases holding that a judgment, without being specially pleaded, is not conclusive upon the issues to which it relates, but is only persuasive evidence, and that the court is at liberty to find according to the truth as shown by all the evidence before it. But according to the weight of authority and upon principle, the former judgment, if admissible in evidence at all, is conclusive of the matters put in issue and actually determined by it.

20 Mr. Greenleaf says correctly that 'the weight of authority, at least in the United States, is believed to be in favor of the position that where a former recovery is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by way of estoppel.' 1 Greenleaf on Evidence, sec. 531. This view is in accord with the decisions of this court above cited."

The converse of the proposition is also undoubtedly true, namely, that unless a previous judgment is conclusive as an estoppel, it is not admissible at all in evidence. For unless conclusive, it is no more than hearsay testimony. This position we do not understand the appellants to controvert. We understand that they rely upon

the decree of the court of the ordinary in Georgia as a conclusive estoppel against the proceedings in this jurisdiction. The question then is, whether that decree does operate as such an estoppel.

At the threshold of our inquiry, it seems rather shocking to the judicial mind that the jurisdiction of a court once acquired should be divested out of it by extraneous proceedings in a foreign jurisdiction; or rather, that it should be told that it may not inquire even into its own jurisdiction, because another court, in another State, has, in an *ex parte* proceeding, made some finding of fact which would be inconsistent with the exercise of jurisdiction; and this, too, when it is conceded that there is property within the jurisdiction of the court which the law gives it the right and makes it its duty to administer. We cannot think that there is any interstate or international comity, or any constitutional provision that would sanction such an anomaly in the administration of justice.

That nearly all the personal property of the deceased at the time of his death was situated in the District of Columbia, no one controverts, and the jury so found. By virtue of that fact, and by virtue of the filing of the appellee's petition for administration upon the estate, that property was brought under the control and jurisdiction of the supreme court of the District, whether the deceased was a resident of the District of Columbia, or of the State of Georgia, and whether he died testate or intestate. It is the express provision of our statute law, that "whenever any person hath died intestate, leaving in this State (District) goods, chattels, or personal estate, letters of administration may forthwith be granted by the orphans' court of the county wherein was the party's mansion-house or residence; or in case he or she had no mansion or residence within the State, letters shall be granted in the county where the party died; and in case the party neither had mansion or residence, nor died within the State, letters may be granted in the county wherein lies, or is supposed to lie, a considerable part of the party's personal estate." Act of Maryland of 1798, ch. 101, subch. 5, sec. 2.

So that in this case the supreme court of the District of Columbia, exercising the powers of an orphans' court, whatever may have been the fact in regard to the residence of the deceased, had the undoubted jurisdiction to grant letters of administration upon the estate in this District. And we cannot for a moment assume that that jurisdiction can be ousted by the removal of the assets afterwards from this District under supposed authority from a foreign jurisdiction. The complications that may arise from such removal cannot enter into our present consideration. The fact remains, and it is the only thing which we can consider in this connection, that, at the time of Haralson's death, and at the time of the application for letters of administration in this District, nearly all the personal property of the deceased was here, and was taken under the control of the supreme court of the District, for the purpose of administration. The extent and character of that administration, it is true, remained to be determined. Had Haralson died intestate or testate? Was he a resident or non-resident of the District of Columbia at the time of his death? Were the letters to be granted letters

testamentary or letters of administration? Was there a will or was there not? There was to be administration in any event, and the property was under the control of the court for the purpose of administration. All the parties in interest came into the court, and instituted proceedings for the determination of the unsolved questions. Issues on those questions were formulated between them; and a trial of those issues was to be had according to law. Was it competent for one of the parties at this juncture to go into another jurisdiction, and there, without notice to the opposing party, and without any knowledge on her part of the proceeding, without trial, without examination, without inquiry, without any knowledge of existing conditions communicated to the court to which the application was made, to assume as true what he knew to be contested, to allege it as truth when he knew it to be denied, to file a petition in the court of an ordinary in the State alleging as a fact that which he knew was then matter of judicial inquiry in the District of Columbia, to conceal from the ordinary, or at least to fail to disclose to him, what we think should have been disclosed to him, under the circumstances, the facts of the existing controversy, and thereupon to procure from him an order in this *ex parte* and practically secret proceeding, which he now proposes to use to prevent judicial inquiry and to estop judicial proceedings in the District of Columbia? If the law sanctions a proceeding like this, then undoubtedly the law should be changed as soon as possible.

There is no necessity to assume that the action of the appellant, Logan Bleckley, in the premises was not taken by him in good faith, and that it is not susceptible of a reasonable explanation. Bad faith is not charged on either side; and we may well assume that there was here no improper purpose on the part of any one, and no intention to procure an undue advantage. But the effect of the course pursued is to affect injuriously the administration of justice in the District of Columbia, and to deprive the appellee of her just rights; and we cannot think that it can be defended upon any ground of constitutional right. The action of the appellant, although taken in good faith and without any fraudulent intent, must be characterized as a fraud in law; and judgments and decrees procured by fraud, whether the fraud be one of law or one of fact, are not of the class of "records and judicial proceedings" that is declared by our Federal Constitution to be entitled to full
21 faith and credit extraterritorially. It is a maxim of the law that fraud vitiates everything; and it will vitiate "records and judicial proceedings" as it may anything else, and render them null and void.

The proceeding in this case in the supreme court of the District of Columbia was a proceeding both *in rem* and *inter partes*. The court had jurisdiction and control of the subject-matter; and by operation of law the *res* was either actually or constructively within its custody. Then all the parties in interest came in to litigate the matters in issue between them. Now, it has been repeatedly decided by the Supreme Court of the United States, that, when proceedings *in rem* have been commenced in a court of competent jurisdiction,

and the court has acquired possession, actual or constructive, of the *res*, and analogous proceedings are subsequently instituted in another court of competent jurisdiction involving the same property, exclusive jurisdiction for the purpose of its own suit is acquired by the court which has first taken possession of the *res;* and the proceedings of the second court, with reference to those of the first, are to be treated as null and void—not necessarily null and void for all purposes, but only with reference to the rights acquired in and under the suit first instituted. Heidritter *v.* Elizabeth Oil Cloth Co., 112 U. S., 294; Covel *v.* Heyman, 111 U. S., 176; Porter *v.* Sabin, 149 U. S., 473; Rio Grande R. R. Co. *v.* Gomila, 132 U. S., 478; *In re* Chetwood, 165 U. S., 443; *In re* Johnson, 167 U. S., 120; Ableman *v.* Booth, 21 How., 506. As stated in several of these cases, the observance of this rule or principle of law is rendered necessary to prevent clashing or collision between courts of equal or concurrent jurisdiction, and to preserve the due and orderly administration of justice.

The action of the court that acquires the later jurisdiction, as we have said, is not to be regarded as null and void for all purposes. Undoubtedly the adjudication of the Georgia court in the present instance is good within the State of Georgia, and may be the foundation even of extraterritorial rights beyond the territorial limits of that State; but against the proceedings upon the same subject-matter in the District of Columbia it can be allowed no validity by the courts of this District. The case is very different, of course, where merely personal rights between parties are adjudicated, as in ordinary actions upon contracts and torts. There only one adjudication is required upon the merits, and only to such adjudication are parties entitled. Cases of this kind stand upon a very different basis from proceedings *in rem;* and especially do they stand upon a different basis from proceedings for the administration of decedents' estates. These last are in their nature local, and have, in general, no extraterritorial force, or at most only a very limited one. Aspden *v.* Nixon, 4 How., 467; Johnson *v.* Powers, 139 U. S., 156. They can give no authority to any one beyond the territorial jurisdiction of the courts in which they are had; and they can scarcely be held to conclude anything for other jurisdictions. To call such a proceeding one *inter partes* would be absurd; to give it the force and effect of a proceeding *inter partes* would be to open the door for the grossest fraud and to overthrow all the safeguards of the law.

Moreover, there was question of jurisdiction involved here. The supreme court of the District of Columbia, beyond all question, had jurisdiction of the property which was situated here; but there was question whether it had the jurisdiction to admit to probate a certain testamentary paper-writing on file in the office of the register of wills for this District. That jurisdiction depended on the matter of the residence of the deceased at the time of his death. The place of residence, therefore, was a jurisdictional fact to be ascertained by the court. Can it be that a court of limited scope and power, like that of the ordinary in Georgia, proceeding summarily and *ex parte* and outside of the course of the common law, will be

permitted to determine that jurisdictional fact finally and conclusively for our courts, and practically nullify the right of trial by jury given in our courts in such cases by statute? It is an invariable and universal feature of our judicial institutions that every court must be the judge of its own jurisdiction in the first instance, and cannot be concluded by what any other tribunal, except of course an appellate tribunal, has said or done in the matter. It would be a singular anomaly in the law if the court of the ordinary in Georgia could, by an *ex parte* order, determine the extent of the jurisdiction of the supreme court of the District of Columbia; as it would equally be an anomaly if the supreme court of the District of Columbia attempted to determine and limit the jurisdiction of the ordinary in Georgia. We are satisfied that neither tribunal would attempt consciously thus to trespass upon the prerogatives of the other. And we are satisfied that, if in the present instance the court in Georgia had had its attention called to the proceedings pending in the supreme court of the District of Columbia, which was not done, it would certainly have stayed its hand, and would not have granted administration even to the extent to which it might properly have granted it—for property in the State of Georgia—until a determination was had of the issues pending in the District of Columbia.

The cases of The Southern Pacific Railway Company *v.* United States, 168 U. S., 1; and Railroad Company *v.* Gorman, 7 App. D. C., 91, are cited by the appellants in support of their contention; but we fail to see that these cases have that effect. To the first of these cases we have already referred in this opinion upon another point. There it was held, that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first case remains unmodified." But evidently this rule, made, as the learned justice who spoke for the supreme court in that case said in the opinion, for the peace and repose of society, applies to matters
22 distinctly put in issue between parties; and it can therefore have no application to *ex parte* proceedings, to judgments entered under statutory proceedings upon notice merely by publication and without personal service of process or some equivalent of it, or to proceedings for administrations upon the estates of deceased persons; nor can it give validity to judgments procured by fraud.

In the case of Railroad Company *v.* Gorman, 7 App. D. C., 91, we held that the grant of letters of administration in North Carolina could not be made the subject of collateral attack in a suit instituted by another administrator in this District, and that a certain finality was to be accorded to the action of the probate court of the foreign State. But a reference to the facts of that case will show that it can have no application to the case now under consideration. There, it is

true, as in the present case, there was controversy as to the place of residence of the deceased person at the time of his death, which death was the result of negligence on the part of a railroad company in North Carolina, the death having happened in that State, and the deceased having been at least temporarily domiciled there.

The only asset of the estate would seem to have been a claim for damages against the railroad company under the statute of North Carolina. Letters of administration were asked for and granted in the State of North Carolina; and similar letters were asked for and granted to another person in the District of Columbia, where it was also claimed the deceased, at the time of his death, had his residence. Suit was instituted in North Carolina by the administrator appointed in that State against the railroad company, and a recovery was had or a settlement was effected in pursuance of the suit. A similar suit was instituted in this District, where the railroad company had an office and an agent, by the administrator appointed here; and at the trial of this latter suit the proceedings and recovery in North Carolina were either introduced in evidence or pleaded as an estoppel. It was sought to attack them by a showing that the deceased was a resident of the District of Columbia, and that therefore the probate court in North Carolina was without authority to appoint an administrator in that State. And we held that this could not properly be done. Plainly that case differs from the present. The court of North Carolina had the undoubted right to grant administration; for the assets were there, the railroad company was there, and the act of negligence happened there. To the railroad company the administrator of the estate appointed in North Carolina was, both in fact and in law, the representative of the estate, and a settlement with him was a discharge by the estate. Assuredly it should not be called upon to pay again in any and every State where it should happen to be suable in consequence of doing business there, and where an administrator should happen to have been appointed. The first recovery must be the only recovery; and it would operate as a fraud if each and every administrator in such suits could go back to question the validity of the appointment in North Carolina.

The question in the case now before us is not one of collateral attack on the validity of the appointment of an administrator in another State. It may be conceded that the proceedings in the court of the ordinary in Georgia are valid for all the purposes which they may legitimately subserve in that State. But we do not think that they can be introduced here to determine the jurisdiction of our own courts, and least of all to divest a jurisdiction already acquired and asserted. And we think the action of the trial court in this case in excluding them from consideration was entirely right and proper.

These views seem to us to be abundantly supported by the authorities. Johnson *v.* Powers, 139 U. S., 156; Aspden *v.* Nixon, 4 How., 467; Stacy *v.* Thrasher, 6 How., 44; Low *v.* Bartlett, 8 Allen, 259; Lindley *v.* O'Reilly, 50 N. J. L., 636.

In our opinion, it follows from what we have said that the order or decree appealed from should be *affirmed, with costs. And it is so ordered.*

Mr. Chief Justice ALVEY dissenting:

I feel constrained to dissent from the opinion of the majority of the court in this case; and though I regret my inability to agree with my brothers, I shall state briefly the grounds of my dissenting opinion.

The appeal is from an order of the supreme court of this District holding a special term for orphans' court business. The order is dated the 22d of April, 1898; and by that order a paper, declared to be the last will and testament of Hugh A. Haralson, deceased, is admitted to probate and record; and because there was no executor named in said paper, letters of administration *cum testamento annexo*, upon the estate of the deceased, were, by said order, granted to Hugh H. Gordon.

The facts of the case, in the order in which they occurred, are important to be borne in mind.

The deceased, Hugh A. Haralson, died in De Kalb county, in the State of Georgia, August 23, 1895. On the 14th of the same month and year, at Savannah, in the State of Georgia, the deceased executed a paper-writing purporting to be his last will and testament; but which paper was signed by the deceased in the presence of but one witness, when, by the law of Georgia, to make a will or testament valid as to personal estate, the attestation of two witnesses were required. By this paper, thus executed, the decedent attempted to dispose of certain bonds of the value of about $9,000. The legatees, to whom these bonds are given by this paper, are his sister, Mrs. Fanny H. Gordon, and his niece, Carrie L. Gordon. These bonds, at the time of the death of Haralson, were on deposit in a bank in the city of Washington, District of Columbia. The paper-writing purporting to be a last will and testament of the deceased having but one witness to its execution, was and is wholly invalid as a testamentary disposition of personal property, by the law of the State of Georgia. But, if the party executing the paper really had his domicil in this District of Columbia, at the time of his death, the paper would be valid and entitled to admission to probate here.

Upon the supposition that the deceased had his domicil
23 here, or was a resident of this District at the time of his death, Mrs. Gordon, the legatee in the supposed will, on the 23d of January, 1896, filed her petition in the supreme court of this District, holding a special term for orphans' court business, praying for the admission to probate and record of the alleged testamentary paper, and for the granting of letters of administration, *cum testamento annexo*, upon the personal estate of the deceased. By this petition, it is alleged, that the deceased, *though a citizen* of the State of Georgia, was, at the time of his death, and for several years prior thereto had been, *a resident* of the District of Columbia, and that he died in the State of Georgia, where he was temporarily engaged in the discharge of his duties as an official of the Government of the United States. It is alleged in that petition that the deceased, at the time of his death, was possessed of personal estate, consisting

chiefly of bonds and stocks, of the value of about $10,000, all of which, except an insignficant part thereof, was then in the District of Columbia. The petition also names the parties who were the next of kin, and distributees of the personal estate of the deceased, and all of whom were non-residents of this District, and citations were prayed to such parties.

To this notification parties interested appeared, and on the 6th of March, 1896, a caveat to the desired probate of the paper propounded as the last will and testament of the deceased was filed by and on behalf of the next of kin of the deceased, other than Mrs. Gordon; and against the probate of the paper propounded, three grounds were stated: 1st. That the said paper-writing is not the last will and testament of the deceased; 2d. That the deceased was not, at the time of his death, a resident of the District of Columbia; and, 3d. That at the time of his death the deceased was a citizen and resident of the State of Georgia.

Upon this caveat to the probate of the paper, the court, on the 10th of April, 1896, made up five issues to be sent to a court of law to be tried by a jury. These issues were: 1st. Whether the deceased was, *at the time of his death*, a resident of the District of Columbia? 2d. Whether the deceased was, *at the time of his death*, a citizen and resident of the State of Georgia? 3d. Whether the deceased was, *at the time of the making of the paper-writing*, propounded as his last will and testament, *a resident of the District of Columbia?* 4th. Whether the deceased was, *at the time of the making of said paper-writing, a citizen and resident of the State of Georgia?* And 5th. Whether, *at the time of his death*, did any considerable part of the personal estate of the deceased exist or lie within the District of Columbia? Some of these issues, especially the third and fourth, were not material to the question of fact upon which the validity of the paper propounded depended, because not determinate of the real question involved.

The issues thus framed were sent to the court of law to be tried, but the trial did not take place until February, 1898. The verdict of the jury was, upon the evidence submitted to them, that the deceased was, at the time of his death, a resident of the District of Columbia, and that he was not, at that time, a citizen and resident of the State of Georgia; that the deceased, at the time of making the paper propounded as his will, was a resident of the District of Columbia, and was not, at that time, a citizen and resident of the State of Georgia; and that, at the death of the deceased, a considerable portion of his personal estate was in the District of Columbia.

This verdict was certified to the special term for orphans' court business, and was made the basis of the order of the 22d of April, 1898, from which this appeal is taken.

The record shows that on the 6th of April, 1896, just one month after the caveat filed, there was filed by Logan Bleckley, one of the next of kin of the deceased, and one of those who had filed the caveat to the probate of the paper propounded in the court in this District, a petition in the court of ordinary of De Kalb county, in the State of Georgia, asking for citation of the parties interested,

and for letters of administration upon the personal estate of the deceased. Upon this application, at the May term of that court, 1896, an order was passed by the ordinary, reciting the facts of the application, and that citation had been published, according to law, requiring all concerned to appear and show cause, if any they could, why letters should not be granted; and, as it is declared, it appearing "that the deceased died *a resident* of said county, *intestate*, and that said applicant is a citizen of this State, lawfully qualified for said administration, and no objection appearing to the contrary," it was thereupon ordered, that said Logan Bleckley be appointed administrator, etc. And letters were accordingly granted.

The trial of the issues framed on the caveat did not take place until March, 1898, nearly two years after the grant of letters of administration in the State of Georgia, and more than two years after the paper had been propounded for probate. On the trial of the issues the caveatee was given the position of plaintiff on the record, and this manifestly was correct, as the onus of proof was upon her. She was required to offer affirmative proof in support of the first, third, and fifth issues; and as to the second and fourth issues, the onus of proof was upon the caveators. And proceeding according to this order of proof, the caveatee offered evidence to show, according to the bill of exception, that the deceased, both at the date of the alleged testamentary paper, and at the time of his death, was a resident of the District of Columbia. And in support of the fifth issue, it was admitted that at the time of the death of the decedent, he had on deposit in a bank, and in a loan and trust company, in this District, money and securities amounting to about $9,000, and that said money and securities *constituted the entire estate of the decedent*, with the exception of about $200 found outside of the District of Columbia. It was further admitted that the money and securities so on deposit in this District, were subsequently removed from the said District by Logan Bleckley, claiming to act as administrator of the estate of the deceased, under and by virtue of letters of administration issued to him by the court of ordinary in the State of Georgia. Upon this proof the caveatee rested her case.

24 The caveators thereupon produced and offered in evidence, to sustain the issues on their part, a duly certified transcript of the record of De Kalb county court of ordinary, in the State of Georgia. This transcript was offered as tending to show that the deceased had died *a resident* of the said county of De Kalb, *intestate*, and that the caveatee was thereby estopped to deny those facts. But the court below rejected the record *in toto*, and would not admit it for any purpose, and the caveators excepted. The only question, therefore, presented on this appeal is as to the admissibility of that record of the proceedings of the court of ordinary in the State of Georgia.

The question is an important and a delicate one, and involves many and serious consequences; and to determine the question thus presented, we must look to and consider the facts involved in the issues on trial, and the nature of the judicial proceeding offered in evidence. It may be that the effect attributed to the judicial pro-

ceeding in Georgia, in the offer made, was too broad and conclusive, and I think it was so. But while the record may not operate as an estoppel on the question of domicil, it does not follow that it should have been rejected as furnishing no evidence whatever. The great and controlling question under the issues was, where was the real and actual domicil of the deceased at the time of his death? That question was jurisdictional in its nature, and it was the fact involved in the issues upon which the rights of the parties depended. I think the record offered in evidence was admissible as evidence in chief under issues two and four, and as evidence in rebuttal of the evidence offered by the caveatee in support of issues one and three. Treating the question of domicil as in the nature of a jurisdictional question, it would seem to follow that the judicial proceedings in the court of ordinary in the State of Georgia would not preclude inquiry into the jurisdiction of that court, in which the proceedings took place, *over the subject-matter*, or the parties affected thereby, *nor into the facts necessary to give such jurisdiction*, namely, the fact of domicil of the decedent at the time of his death. Simmons *v.* Saul, 138 U. S., 439, 448; Thompson *v.* Whitman, 18 Wall., 457; Cole *v.* Cunningham, 133 U. S., 107.

The record, however, should have been admitted, in connection with the other facts, as reflecting upon *the fact of domicil* of the deceased at the time of his death. For if it be true, as declared by the judicial finding of the Georgia court, that the decedent was, at the time of his death, a resident of or domiciled in the State of Georgia, then he certainly died intestate as to all his personal property, wherever situate. It is conceded that the paper-writing propounded for probate in this jurisdiction, as a testamentary instrument, has no validity whatever by the law of the State of Georgia; and it is also conceded that before the instrument was admitted to probate here and annexed to letters of administration, all the personal property belonging to the estate of the deceased had been removed from this jurisdiction and taken to the State of Georgia by the administrator appointed there; so that there was no property whatever in this jurisdiction upon which the supposed testamentary paper and the letters of administration granted here could operate. And upon the assumption that the domicil of the deceased at the time of his death was in Georgia, the claim to and removal of such bonds, money, or securities, by the Georgia administrator, were in all respects lawful and proper. Act of Congress, February 28, 1887 (24 Stat., 431); Wilkins *v.* Ellet, 9 Wall., 740; Wyman *v.* Halstead, 109 U. S., 654, 656; Parsons *v.* Lyman, 20 N. Y., 103. It is a principle well settled that where there are no debts due from the estate in the jurisdiction where a foreign debtor of the estate resides, and no ancillary administration has been granted there, the principal administrator may, in such foreign State, receive a voluntary payment from the debtor, which will be a good discharge of the debt, *even if an ancillary administration should be afterwards appointed.* Wilkins *v.* Ellet, 9 Wall., 740; Mackey *v.* Coxe, 18 How., 100, 104; Wyman *v.* Halstead, *supra.* Nor did the fact of the pendency of the issues formed on the caveat to the alleged testamentary paper, involving

the question of the residence or domicil of the decedent in this district, or the paper after it had been admitted to probate here, with letters of administration, affect in any manner the right of the foreign administrator, as to acts done and rights attached before probate obtained. He derived his authority from a competent jurisdiction, and that authority he was entitled to have respected by the courts of this jurisdiction, both by express provision of statute, and by the comity of States. The subsequent probate of the paper and the grant of letters of administration here will not have the effect of vacating the letters of administration granted in Georgia, or of divesting the administrator in that State of the funds that he lawfully received and removed from this District; that was a lawful act done by him by virtue of a competent authority derived from the court of ordinary in Georgia. Schluter *v.* Bowery Saving Bank, 117 N. Y., 125. If the deceased was in fact domiciled in the State of Georgia at the time of his death, as he was found and declared to have been by a court of competent jurisdiction in that State, then the probate of the paper in this District was wholly without effect and operation, even as to the bonds and securities mentioned in the paper. For it is now a settled principle in the jurisprudence of this country, as it is in the jurisprudence of England, that the succession to and distribution of personal property is regulated by the law of the owner's domicile, and not by the *lex loci rei sitæ;* and that a will of personal estate must, in order to pass the property, be executed according to the law of the place of the testator's domicil at the time of his death. This principle appears to have been first definitely laid down in this country in the case of Deserbats *v.* Beiqniers, 1 Binney, 336. In that case, a foreign testator, domiciled abroad, had made a will of his personal estate, invalid according to the law of his domicil, but valid according to the law of Pennsylvania; and the question was, whether it was competent and valid to pass personal property situate in Pennsylvania. This question was much considered, but the court held that the
25 paper was not valid and effectual to pass personal property situated in Pennsylvania; and laid down the general doctrine, that a will of personal property must, in order to pass the property, be executed according to the law of the place of the testator's domicil at the time of his death. If void by that law, it is a nullity everywhere, although it is executed with the formalities required by the law of the place where the personal property is locally situate. The court, in that case, assert what has been repeatedly held in subsequent cases, that, in respect to the controlling effect of the domicil, there is no difference between cases of succession by testament, and by intestacy. 1 Sto. Confl. Laws, sec. 468, and cases cited.

In the case of Whicker *v.* Hume, 7 Ho. L. Cas., 124, the questions involved in this case were very fully considered, both at the bar and by the court. In that case the testator had died in Paris, where he had lived for some time, and he made his will there, but he made it in English form, and it was admitted to probate in England. One of the questions much considered was, at what place

the testator really had his domicil at the time of his death—whether in France, in Scotland, or in England, as he had lived in all three countries. It was concluded upon the facts, that he was domiciled in England at the time of his death. And the general doctrine was laid down and maintained, that a will to be valid must be executed according to the law of the country where the testator was domiciled at the time of his death; and that while the grant of probate, not vacated on appeal, conclusively establishes that the will was so executed, yet it does not conclude on the question of domicil. In that case there were several opinions delivered, and the law lords all concurred in maintaining the general principle, that the maxim, *mobilia sequuntur personam*, is part of the *jus gentium*, and, therefore, that the post-mortuary distribution of the effects of a deceased person must be made according to the law of his domicil at the time of his death; and, consequently, if the law of the country allowed the deceased to make a will, that will must be made as that law requires.

The Lord Chancellor (Chelmsford), after stating some of the general features of the case, said: "I apprehend, that this will having been admitted to probate, it must be taken to be a valid will wherever it shall turn out that the testator was residing at the time of his death, but that the place of domicil is still open for consideration, and also the validity of the bequest contained in the will, and the effect of it according to the law of the domicil of the testator. The question, therefore, being open for consideration as to where the testator was domiciled at the time of his death, it will be necessary to enter shortly into the consideration of the evidence upon that subject."

Lord Cranworth, in his opinion, said: "The first question made is one that was extremely important, namely, the point, whether probate was or was not conclusive evidence of the domicil. Now, I have no hesitation in saying, that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else. That may be illustrated in this way. Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person could give away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary, but it would be conclusive of nothing more, for after that there would then arise the question, how is the court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for, by the law of the country the property must be administered. Therefore, if the testator, in the case I have supposed, had given away all his property, consisting of £10,000, it would be the duty of the court that had to construe the will to say £5,000 only can go according to the direction of the will, and the other £5,000 must go in some other channel.

Therefore, I think it is clear that that proposition is one that cannot be maintained."

And Lord Wensleydale, while giving his own definition as to what constitutes domicil of a testator, said: "I take it to be a perfectly clearly established proposition at this day, confirmed by the case of Stanley *v.* Bernes, 3 Hagg, Eccl. R., 373, that the succession must be regulated according to the law of that country where the deceased was domiciled at the time of his death, and that to make a valid will it must be executed according to the forms of the law of that country."

As I have already stated, it is freely conceded by the appellee that the paper produced here for probate is wholly void and without effect by the law of the State of Georgia, because not attested by more than one witness. But if it be true, that the deceased was, at the time of his death, domiciled in this District, then the paper, though attested by one witness only, is a good and valid testamentary paper, and is therefore entitled to be admitted to probate here. The important question, therefore, to be determined on the trial of the issues framed on the caveat to the paper was the question of domicil of the deceased at the time of his death—whether in the State of Georgia or in this District of Columbia. I am of opinion that the Georgia record of the grant of administration in that jurisdiction ought to have been admitted in evidence to the jury, in connection with the conceded facts that the deceased was a citizen of Georgia, that the paper in contest was executed in that State, and that the deceased died in that State soon after the paper was made.

But, as the case has been decided by the court below, and affirmed by a majority of this court, the question will arise, what practical effect can be given to the probate and letters of administration that have been granted here? There is, as we have seen, an antecedent administration in the State of Georgia, founded upon the alleged domicil or residence of the deceased in that State at the time of his death, and that he died intestate; and moreover, all the property that the supposed testamentary paper and letters of administration granted here, could affect or operate upon, has been, under the
26 sanction of law and authority, withdrawn and taken to the jurisdiction of the original or first administration. It is hardly supposable that the courts of Georgia will give effect to the probate of the paper and letters of administration granted here regardless of their own local administration. It is well settled by the courts of that State, that the courts of ordinary there are courts of original, exclusive and general jurisdiction over decedents' estates, and the subject-matter of their orders and judgments *are* no more open to collateral attack than the judgments, decrees or orders of any other court. Veach *v.* Rice, 131 U. S., 293, 314; Davie *v.* McDaniel, 47 Ga., 195; Barnes *v.* Underwood, 54 Ga., 87; Arnold *v.* Arnold, 62 Ga., 627; Tant *v.* Wright, 65 Ga., 412. The case, therefore, necessarily presents, or will present, an unfortunate conflict of law and jurisdiction, and the only hope is that the Supreme Court of the United States, if the case should reach that tribunal, may find a way of overcoming the difficulty.

27 WEDNESDAY, *November 2d, A. D.* 1898.

ELIZABETH S. OVERBY, LEONORA H. PACE, Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, Appellants,
vs.
FANNIE H. GORDON.
No. 809, October Term, 1898.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the order of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

November 2, 1898.

Dissenting, Mr. Chief Justice Alvey.

THURSDAY, *November 17th, A. D.* 1898.

ELIZABETH S. OVERBY, LEONORA H. PACE, KATE Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, Appellants,
vs.
FANNIE H. GORDON.
No. 809.

On motion of Mr. F. D. McKenney, of counsel for the appellants in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

28 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Elizabeth S. Overby, Leonora H. Pace, Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, appellants, and Fannie H. Gordon, appellee, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy

justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal Court of Appeals, District of Columbia.]

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

29 Know all men by these presents that we, Elizabeth S. Overby, Leonora H. Pace, Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, as principals, and American Bonding and Trust Company of Baltimore, Maryland, as surety, are held and firmly bound unto Fannie H. Gordon in the full and just sum of three hundred dollars ($300), to be paid to the said Fannie H. Gordon, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this first day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Elizabeth S. Overby, Leonora H. Pace, Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, appellants, and Fannie H. Gordon, appellee, a judgment was rendered against the said Elizabeth S. Overby, Leonora H. Pace, Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Fannie H. Gordon, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said appellants above named shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea

good, then the above obligation to be void; else to remain in full force and virtue.

ELIZABETH S. OVERBY, [SEAL.]
LEONORA H. PACE, [SEAL.]
KATE CULBERSON, [SEAL.]
PAUL BLECKLEY, [SEAL.]
LOGAN BLECKLEY, [SEAL.]
HARALSON BLECKLEY, [SEAL.]
By PHILLIPS & McKENNEY, *Att'ys-in-fact.*

[Seal of Amer. Bond'g & Trust Co.]

THE AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY,
By L. O. DE LASHMUTT, *Attorney-in-fact.*

Sealed and delivered in the presence of—
—— ——.

Approved, not to act as a supersedeas, by—
R. H. ALVEY, *Chief Justice.*

[50c. internal-revenue stamp.]
[5c. internal-revenue stamp.]

[Endorsed:] No. 809. Elizabeth S. Overby, Leonora H. Pace, Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, appellants, *vs.* Fannie H. Gordon. Bond on writ of error to Supreme Court United States. Court of Appeals, District of Columbia. Filed Dec. 6, 1898. Robert Willett, clerk.

30 UNITED STATES OF AMERICA, *ss:*

To Fannie H. Gordon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Elizabeth S. Overby, Leonora H. Pace, Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this sixth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted December 7, 1898.
HENRY E. DAVIS,
C. C. TUCKER,
For Defendant in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 7, 1898. Robert Willett, clerk.

31 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 30, inclusive, contain a true copy of the transcript of record and poceedings of said Court of Appeals in the case of Elizabeth S. Overby, Leonora H. Pace, Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, appellants, *vs.* Fannie H. Gordon, No. 809, October term, 1898, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 7th day of December, A. D. 1898.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

[Ten-cent U. S. internal-revenue stamp, canceled Dec. 7, '98. R. W.]

Endorsed on cover: File No., 17,214. District of Columbia Court of Appeals. Term No., 168. Elizabeth S. Overby, Leonora H. Pace, Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, plaintiffs in error, *vs.* Fannie H. Gordon. Filed December 9th, 1898.

[redacted]

[redacted]

[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 168.

ELIZABETH S. OVERBY, LEONORA H. PACE, KATE CULBERSON, PAUL BLECKLEY, LOGAN BLECKLEY, AND HARALSON BLECKLEY, PLAINTIFFS IN ERROR,

vs.

FANNIE H. GORDON.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief of Argument for Plaintiffs in Error.

This case comes before this court on a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court (R., 27), which affirmed an order of the supreme court of the District of Columbia, holding a special term for orphans' court business, admitting to probate a paper purporting to be the last will of one Hugh A. Haralson, deceased.

The order of such special term was entered after proceedings had on a caveat filed by the plaintiffs in error. The issues (R., 7) turned substantially upon the question whether

the decedent at the time of his death was a resident of the District of Columbia or of the State of Georgia, wherein he died, and such issues were determined in the former alternative (R., 7).

The matter of *residence* is important, because the alleged will, which concerns *personalty* only, has but *one* subscribing witness (folio *1*), and would be invalid if the testator had been a resident of Georgia, where *three* such witnesses are required by the probate laws, but valid if he had been a resident of this District, where none is required. (See *Extracts*, &c., at back of this brief, "sec. 2383.")

The propounder of the alleged will is a sister of the decedent, and a principal beneficiary under that paper. The caveators are two other sisters and the children of a sister deceased. The propounder and caveators are the decedent's sole next of kin, and all, except one of the caveators, are residents of Georgia (*4*).

The allegations of the petition for probate in respect of the residence in question are (*4*), that several years before his death the decedent changed his *residence* from Georgia to this District:—whilst, according to the contention of caveators, that *change* had not been one of *residence*.

Upon the trial of the issues and after the propounder had rested (*10*), the caveators offered on their part a transcript of a record of certain proceedings *inter partes* in the court of ordinary of De Kalb county, Georgia—as tending to show that the decedent was at the time of his death a resident of that county and had there died intestate; and that the plaintiff was a party to such record and estopped thereby; but the trial court excluded such transcript of record, and the defendants thereupon excepted to such ruling.

Thereupon, the jury having found that the decedent was at death a resident of this District, and this finding having been certified to the orphans' court (*8*), the latter ordered that the will should be admitted to probate, &c.; and the caveators appealed to the Court of Appeals; where the action below was affirmed; and the caveators appealed again, to this court.

For error, the appellants assign that action by the Court of Appeals, particularly in regard to the exclusion of the record.

The short point of law understood to be presented here, is, therefore, The operation within a court of the United States of a supposed estoppel by a previous *finding* in a case *inter partes* which had pended and passed into judgment in a State court of general jurisdiction.

The contents of that record were in substance as follows (*11 et seq.*):

1. A petition by "Logan Bleckley" [one of the caveators] showing that Hugh A. Haralson had died "*a resident of said county, intestate,*" leaving property worth about $10,000, and that the petitioner is one of his next of kin. The prayer was for "*an order directing that citation be issued herein and published as the law requires, and that if no good cause can be shown to the contrary,*" the petitioner be appointed administrator (*11*).

2. The ordinary's order for citation, dated April 6, 1896.

3. An order by the court of ordinary, referring to the above petition for letters, &c., upon the estate of Hugh A. Haralson, deceased, and reciting "*that citation therein was issued and published according to law, requiring all concerned to appear at this term and show cause, if any they could, why such letters should not be granted; and it also appearing that said deceased died a resident of said county, intestate, and that said applicant*" is lawfully qualified, "and no objection being offered thereto, it is therefore ordered" that said applicant be appointed administrator, upon giving bond with approved security in $20,000 and taking the oath, &c.

[NOTE.—In thus placing the jurisdiction of the De Kalb court upon the matter of the *residence* and *intestacy* of the deceased, the petition and the accompanying grant of letters respectively asserted and decided, as against all persons bound thereby, that not only *administration* but, by a necessary implication, *succession and future distribution* as well, were to be in that case governed by the laws of Georgia.]

4. The oath.

5. The bond.

6. A certificate of the clerk of the court of ordinary, W. M. Ragsdale, that the transcript is a full and exact copy, &c., and,

7. A certificate by the same Ragsdale, as "ordinary of the county and State, and presiding judge of the court thereof," that the said clerk is such, and his foregoing certificate and attestation in due form. (See 2 Black, Judgts., sec. 879. And Comer *vs.* Ross, 100 Georgia, 652: "The or-

dinary is an official charged with duties judicial, ministerial and clerical. * * * He is also, in office, his own clerk.")

Courts of ordinary in Georgia are courts of *general* jurisdiction:—Veach *vs.* Rice, 131 U. S., 314:—Have "just the same jurisdiction until the case be removed by appeal as the superior courts have after." (Perkins *vs.* Attaway, 14 Ga., 273; so 47 Ga., 195; 50 *id.*, 231; 72 *id.*, 725; &c.).

The standing, at home, of the Georgia court of ordinary is illustrated by the three following cases:

Stewart *vs.* Golden, 98 Ga., 479, concerned the validity of a deed by an administrator appointed in 1861 by the court of ordinary of Meriwether county; and by it afterwards authorized (1874) to sell and convey land; and the title so given was in question. It appeared that in 1890, after the pending action had been brought, the defendants therein applied to the same court of ordinary to set aside the order of 1861, on the ground that in fact the deceased had not resided in that county; and after service of a rule, no defense being made, this had been done; and, further, such last order having been introduced in evidence in the court below, the jury had been instructed to find for the plaintiff, and accordingly had done so.

The question in the Supreme Court was whether the order *to set aside* was not *void* under a certain statute, because not made within *three* years after the order of 1861 had been given.

To this the court said that, as the party objecting had been a party to the proceeding to set aside, he was concluded from raising such objection: "The ordinary had jurisdiction of the subject-matter and the parties, and a judgment unreversed would bind all parties who were before him. * * * When one is in court he must make his defense; if he does not, he cannot afterwards insist that the judgment is void."

Arnold *vs* Arnold, 62 Ga., 627, is an interesting case in the same connection. A, who had previously been a resident of Georgia, removed to Arkansas, and after being domiciled there died, leaving two paper-writings in the nature of wills; and also personal estate to a considerable amount in Georgia. Thereupon the next of kin, disregarding such papers, applied in Coweta county, Georgia, for letters of administration. Whilst this pended upon appeal, the several beneficiaries under the paper-writings applied in Fulton county, Georgia, for probate of one of these, and for a mandamus to enforce the other,—treating it as a disposition *inter vivos*. Pending these proceedings, a bill in equity was filed by the applicants for *probate*, praying for an injunction against the application for letters of *administration*, until that for probate had been determined,—and for an injunction against the mandamus.

The court refused this prayer, saying, amongst other things: "The application in Coweta county for letters of administration went upon the ground that James Arnold died *intestate*, and that he *left assets in that county* to be administered. These questions are both covered by the caveat, and the caveator and the applicant are at issue upon them.

The complainants in this bill can become parties to that issue if they please to do so. They and all the world beside have been cited to appear and show cause against the application for letters of administration. The court of ordinary of Coweta is perfectly competent to decide whether the deceased died intestate, and also whether he left assets in Coweta. There need be no anticipation of a mistake, or of an erroneous decision upon either question. If perchance error should be committed, there is an easy corrective by means ultimately of a writ of error to this court."

Tant *vs.* Wright, 65 Georgia, 412, was a suit for land, brought in Richmond county by certain *heirs*. The defendants claimed through a sale, &c., by the *administrator* under an order by the *Floyd county* court of ordinary, by which also the administrator had been appointed. The heirs denied the jurisdiction of that court to make the appointment, because at death the decedent had resided in *Richmond county*. The record of the appointment showed a recital that the deceased was *late of said county of Floyd*.

The Supreme Court said, page 414: "The court of ordinary of Floyd county therefore had jurisdiction of the general matter of granting letters of administration on estates of dead persons; and, as it had that general jurisdiction, even if the fact did not appear on the face of the letters and proceedings that the intestate died a resident of Floyd county, and that this fact was made known to the court of ordinary and judicially determined by that court, the presumption would be that that had been done. But when it is recited in all the proceedings before that court and in the letters themselves that the deceased was of that county at the time

of his death, it is patent that the court passed upon that question and adjudicated it. If so, the heirs-at-law, adult or minors, are concluded by that judgment just as much as they would have been had a plea to the jurisdiction been filed and witnesses examined thereon *pro* and *con*, and the plea overruled. At least they would be concluded in all courts except that which rendered the judgment, where it could be attacked and set aside or revoked, or in a court of chancery on a proper case made. Such seems to be the great current of authorities cited by the defendant in error, and such unquestionably is the law of this State as adjudicated by this court in 7 Georgia, 362."

The series of facts, with their respective dates, which led to the action shown in the record now in question is as follows:

The decedent died, August 23, 1895, folio *4*, having executed the will, *3*, upon the 14th of the same month.

The petition for probate, *4*, was presented January 23, 1896, and the caveators came in, *6*,—March 6, 1896.

The issues, *7*, were filed April 10, 1896.

These were, in substance:

1 and 2. "Was the said deceased, *at the time of his death*, a resident of the District of Columbia," *or*, "of the State of Georgia?"

3 and 4. Same issues, in respect of "*the time of making the paper-writing purporting to be his last will.*"

5. "At the time of his death, did any considerable part of *his* personal estate lie within the District of Columbia?"

The petition for administration in Georgia was filed, folio *23*, April 6, 1896.

The names of the next of kin and their places of residence are stated, *5*, in the petition for probate.

The question presented by the assignment of error is as to the operation, under the details of the record, of the familiar "faith and credit" rule of the Constitution, (and Revised Statutes, section 905) within the courts of this District, upon a record of judicial proceedings in a court of general jurisdiction in Georgia. (See Henley *vs.* Donohue, 116 U. S., 1.)

We will notice first certain detached points in the record, some of which affect this case without concerning the general theory of *estoppel* herein presented.

(1) The parties in the two cases here are the same, viz., all of the next of kin of the decedent: and these have appeared *personally* in the pending case; but in the Georgia case, excepting the petitioner of course, were brought in *by publication* under a statute. Secs. 3394 and 4254 of the "Code of Georgia:" see end of this brief.

(2) And in this connection it will be noticed that all of the next of kin but one *caveator*, are *residents* of Georgia, and therefore are bound by its statutory provisions for *constructive service of process*. So that the judgment against the caveatee in conformity with that statute, and the findings, are deemed by other courts within the United States to have been rendered with *jurisdiction* as to her. (Grover *vs.* Rad-

cliffe, 137 U. S., 287; Knowles *vs.* Gas Light Co, 19 Wallace, 16; Wharton, Conflict, &c., sec. 708; Story, do., p. 809, Bigelow's note *b;* 2 Black, Judgments, sec. 836; 1 Duvall, Ky., 329; S. C., 38 Am. Dec., 629).

(3) Nor is the circumstance here that the finding was made in a suit *commenced pending the one in which such finding is invoked*, any matter of objection to its introduction. This is so even where the judgment itself is invoked (1 Chitty, Pl., 689, note *u;* 1 Taunton, 333; 2 Black, Judgments, sec. 791; Emery *vs.* Fowler, 39 Me., 326; 63 Am. Dec., 326). Much more when it is *an admission* therein made *by a party to such pending suit* that is offered. For any party is free to give away a right of action by admissions, direct or indirect, made at any time before judgment. Whether these *admissions* are *in pais*, or are imputed for reasons of general *policy* to certain inaction and *default*, can make no difference.

(4) Another matter remarked upon in the argument below was—an alleged *contempt* of the orphans' court, committed by the caveators after they had become parties to the case below, by instituting similar proceedings in the Georgia court; and something was said in the same connection as to violation of *comity* by the latter.

It seems certain that the mere application for action *in rem* in Georgia was no violation of courtesy, and no contempt of the courts of this District. For, a District administrator *cum testamento annexo*, supposing this will (which appointed no executor) admitted to probate, would have had no authority in Georgia, even in the absence of the above-mentioned application. And if such application were innocent in itself, certainly the allegations in support of it could in

reason be limited only by the candor of the applicant. The fact that he had openly asserted such *residence*—by caveat *previously* filed in the orphans' court of this District, and again by deliberate challenge (given in the court of ordinary of the very county in which the caveatee was then and had long been resident) to disprove such allegations,—seems to be irreconcilable with *concealment*, or with *contempt*, technical or other; and equally so, with *want of comity* upon the part of the court which entertained the application, and thereafter pursued the even way of the law in making the finding in question.

The earlier assertion of that *contention*, within this District, was indeed a candid notice to all concerned that the caveators might follow it up by any consistent action whatever; *ex. gr.*, in the very county of the residence of the propounder,—a selection of venue certainly not an outrage upon any proprieties involved. The application within that venue after notice according to law merely followed up a previous *hint*.

Indeed, if it be true, as seems to be clear upon principle, and also has been *held*, in Last Chance Co. *vs.* Tyler Co., 157 U. S., 683, *that a judgment by default entered after full opportunity has been given to appear and contradict, is to be treated in itself and its essential incidents as if made after full contradiction by the defendant*,—the question occurs,—Why did not *the caveatee* appear in the court of ordinary, and there deny and disprove the allegation of a Georgia residence? The general conclusiveness of the judgment by default in question therefore embraces a special conclusiveness as to negligence from this point of view—such negligence we mean as deprives the plaintiff of any claim to suggest *con-*

tempt, or *want of comity*, by the opposite party, *or by the court of her place of residence.*

(5) The last of these minor points arises out of the circumstance that the order in the Georgia court to which this finding was incident, was limited *by the bounds of that State,—i. e.*, was for the appointment of an administrator;—which may occasion a suggestion that the finding itself could have no operation beyond such bounds. It is submitted that the principles already noticed as dividing the operation of *findings* from that of *judgment*, indicate that this suggestion should be answered in the negative. But it has also in effect been so decided, and argument is therefore needless; Dobson *vs.* Pearce, 12 N. York, 156;—the language of which decision has been quoted from with approval in Embry *vs.* Palmer, 107 U. S., 3, 12; see also Cole *vs.* Cunningham, 133 U. S., 147.

To proceed with the general argument:

The case of The Southern Pacific R. Co., 168 U. S., 1, already referred to, was one in which the United States had filed a bill to quiet title to a large quantity of public land more or less affected by previous land-grants for railroad purposes; and a question arose as to the bearing upon the defense, of a suggestion by the Government of *res judicata*, by previous decrees or findings of the courts in regard to other lands in like case: one especial question being, whether a finding that a certain map had been one of *definite location*, was conclusive of that matter, it being urged

per contra that in fact it had not even been in issue in the previous case, or even discussed.

We quote the following rule from page 48:—

"The general principle announced in numerous cases is, that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must as between the same parties or their privies be taken as conclusively established so long as the judgment in the first suit remains unmodified."

Of the fifteen cases referred to by the court in that connection, *several* had held that the suit in which the finding was made need not have been upon the same cause of action as that in which such finding was invoked; *others*—that if the former proceedings be not pleaded, but only introduced in evidence, they are nevertheless *conclusive* of the matter found in them; whilst the case, Last Chance Co. *vs.* Tyler Co., is quoted for the rule that "judgment *by default* is just as conclusive an adjudication between the parties of what is essential to support that judgment as one rendered after answer and contest:"—an expression to the same effect as one quoted above from Tant *vs.* Wright, 65 Ga., 412.

[In connection with the quotation last made it seems convenient to quote further, as follows, from the same opinion, reported in 157 U. S., 683:

"The essence of estoppel is that there has been a judicial administration of a fact, and the question always is, Has there been such administration?—and not, Upon what evi-

dence or by what means it was reached? A failure to answer is an admission of the truth of the facts stated in the complaint, and the court may properly base its administration on such admission. Suppose a defendant files a denial, and on the trial the only evidence is the testimony of a witness to an admission made by the defendant out of court, and upon such testimony the judgment is rendered, is it any the less a judicial administration because resting simply upon proof of the defendant's admission. And yet in principle what distinguishes that case from this? In each the judgment is resting upon an admission of the party against whom the judgment is rendered, and does it make any difference in what form that admission is presented to the judge? [And, quoting from Freeman on Judgments:] 'Upon principle, we think that the denial of a fact subsequently judicially established ought not to impart to a judgment any greater effect than if all the parties had expressly or impliedly admitted the fact to be beyond controversy when such adjudication was made; and this is the view taken by the greater portion of the American courts.' [Then, quoting from Bigelow on Estoppel:] 'The meaning is simply that judgment by default, like judgment on contest, is conclusive of what it actually professes to decide as determined upon the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgments on the pleadings.'"]

In further discussing the case of The Southern Pacific Railroad Co., the court said,—replying to an objection that there was no *plea* of estoppel:

"The judgment in the prior suit,—the present being on a different cause of action,—could not be pleaded as an absolute bar arising upon the face of the record, but could be used *as evidence* to support the contention that the maps of 1872 suffi-

ciently identified the lands granted by the act of 1866. The contrary is again asserted by the railroad company in this suit. But that precise issue was made in the former suit, and was determined for the United States. And to establish that fact the latter introduced the former record as evidence in its behalf."

The court concludes this point by saying that even if it had been competent for the Government, by appropriate allegations, to *plead* the previous judgment, &c.—" it was not bound to pursue that course, or to amend its bill and set out what was only evidence of its title " (pp. 57, 58).

The last topic in the above case to be noticed is one in which a matter much debated in the reports is settled, viz., as to the *weight* to be allowed to former judgments, etc., when introduced in evidence without having been pleaded. These are held to be *conclusive* (pp. 59, 60).

We come now to two cases which, if the minor points in the present one have been met, appear fully to sustain the general contention of the appellants:—Caujolle *vs.* Ferrié, 13 Wall., 465; and Blackburn *vs.* Crawford, 3 Wall., 175.

1. In the former of these a bill had been filed in a circuit court of the United States by certain alleged next of kin, for *distribution* of an estate; and the defendants (administrators) had pleaded, in bar, a finding by courts of the State—*surrogate*, &c.—upon a contest for administration upon the same estate, and betwixt the same parties:—that one Ferrié, a son of the deceased, who had been alleged by the now plaintiffs to be illegitimate, was legitimate, and therefore next of

kin, and entitled to administration. The court below overruled that plea, and the case went to hearing upon the merits, with the result that Ferrié was again found to be legitimate. And the plaintiffs appealed. Upon the hearing above the Supreme Court recurred to the judgment *upon the plea*, in the circuit court, and reversing that, dismissed the bill.

It will be noticed that Caujolle's case, like the present, was one in which a finding in a State probate court upon an application for administration *inter partes*, was held to estop the same parties in a subsequent proceeding concerning the same general matter, viz., *succession*, before a court of the United States. There, as here (see statutes at end of this brief) the court which had made the finding when sitting in matters of *administration*, was a court of *distribution* as well; and therefore the following passage in the opinion is quoted as pertinent:

"They say the point was cognizable only incidentally, but how can this be, when the surrogate could not have done the thing which he did do without deciding it? It had to be decided in order to determine to whom the letters should issue, and the decision of it, of necessity, settled the distribution of the estate. If this litigation can be renewed in a separate suit for distribution in another court, then the same persons can try the same question, in respect to the same subject, in two different suits. * * * Suppose the suit for distribution had been brought in the surrogate's court, can there be a doubt that the decree granting administration to Ferrié would be pleadable in bar to it? If such be its effect in that court, can or ought it to have a different effect in another court of concurrent jurisdiction?"

It will be noticed from the record of Caujolle's case that the Supreme Court was alert in availing itself of an opportunity for applying the doctrine of *res judicata* in respect to *findings*. For the court below had gone on to affirm the previous action of the surrogate, *upon the merits*. But the Supreme Court, considering, apparently, that the plea contained wholesome doctrine, made its decision to turn upon *estoppel*. The second suit there was for *distribution*, whilst here the second suit is one of the exceptional cases in which a Federal court may grant *administration*. This difference may be read into the above *catechism* by Mr. Justice Davis with *a fortiori effect*: viz., that if *the Georgia court* could not for any purposes affecting the *distribution* of the estate have reversed its findings in the course of *probate*, as to the residence of the decedent, how can this be done by a court of concurrent jurisdiction?

[Noticing the English authorities cited by the court in Caujolle's case, it may be pertinent to add that inasmuch as the "new" Court of Probate in England is not, as its predecessor was, a court of *distribution* also, its findings as to *residence*, etc., in cases *inter partes* are no longer binding for cases of distribution, in the courts of chancery—as by the cases cited it had previously been. The very interesting and elaborate case of Concha *vs.* Concha, L. R.—finally reported in 11 Appeals, 541, 556, 564, turns, in one aspect, upon this statutory change of law.]

2. Blackburn *vs.* Crawford, 3 Wall., 175, is referred to in Caujolle's case as exhibiting the same "principle." That ~~latter~~ was *ejectment*, brought in the U. S. Circuit Court for

Maryland by the Crawfords, as heirs, etc.: and one *defense* was that these persons were not *legitimate*. For this the defendant offered a record of a Maryland orphans' court in a contest betwixt himself and one of the plaintiffs, for administration upon the estate of the ancestor. But it was excluded. Upon appeal, the Supreme Court held that this *was error*.

Here, as may be noticed, a finding concluded only that one of the Crawfords who had been a party to the contest in the orphans' court,—whilst, as is certain, the others were as much bound as he *by the appointment itself*,— the *res*.

We close this brief by noticing specially *three* points which appear to be somewhat prominent in the two opinions (in chief, and dissenting,) delivered in the Court of Appeals. For other parts of these opinions, there is little left to us beyond *a mere repetition*, as above, of the contention, heretofore relied upon by us in the courts of this District, as above.

1. The Orphans' Court below has at no time had *possession*, either actual or constructive, of the assets of the decedent. If at the initiation of the caveat, or some other time, it had appointed an administrator *pendente lite* this might have been otherwise. But no application was made for such appointment, or for any other action looking to the taking charge of such assets.

Accordingly, Heidritter's case, and the six others, referred to together upon page 22, top, of the record, do not support the suggestion in that connection,—of an improper interference by the Court of Ordinary in Georgia,—or by parties

litigant therein, with a *res* then in the custody of the Orphans' Court here. For in every one of those cases the *res* in question was in the possession of some receiver, marshal, or other official of the court that had been interfered with.

2. Johnson's case, and four others, referred to upon page 24, bot., are authority for the familiar rule that an appointment of an administrator etc. within one jurisdiction, does not conflict with a like appointment made later in another jurisdiction. But in the passage here in question they are used as authority for the position that *findings of fact* betwixt adverse parties in course of the application *inter partes* for *such* former appointment, are *incompetent* as evidence betwixt the same parties upon the application for *such* second one.

We submit that the cases cited do not support that position;—a position which otherwise is directly contradicted by authorities cited above,—p. [illegible], etc. And upon general principles it seems plain that if in qualifying itself for official action within its jurisdiction and duty, whether such action is to be, upon one hand of brief or particular, or upon the other, of permanent or general operation, it becomes necessary for the court to establish some preliminary fact,—*the binding operation of such finding inter partes must correspond with its own character as formulated; and does not depend upon that of the judicial action to which it may then or there be incidental.*

3. Whilst we have congratulated ourselves, and still do, upon the countenance which our contention has received, in the dissenting opinion below,—yet we may be allowed at

the same time a *protest* against a suggestion therein (Rec., p. 28 top), that the Georgia record, *although competent, is not conclusive* as evidence of the facts *found* therein.

The case upon the record is a full equivalent (see *Last Chance Co. vs. Tyler Co. and Tant vs. Wright*, as above) *for one, ex. gr., in which,—in the Georgia court, the present appellee, had actually appeared, and had thereupon alleged, and introduced witnesses to prove, that the decedent was at death not a resident of De Kalb county, and did not die intestate; in which also the court had found to the contrary of such allegations, and had appointed an administrator accordingly:—the present appellee thereupon taking no appeal, or further action.*

We understand *Whicker vs. Hume*, 7 *H. of L. Cases*, 124, to be referred to in the dissenting opinion below, p. 29 bot., in support of the view that in another like case betwixt the same parties previous findings *inter partes*, although competent evidence between the parties, *would not be conclusive.*

Whicker vs. Hume was not cited directly in our brief in the Court of Appeals, because it appeared conspicuously in the report of case of *Concha vs. Concha* (both in the H. of Lords and *below*, see 29 Ch. Div., 268), and to this attention had been called in that brief, p. 20, top. No mention is made in *Whicker vs. Hume* of the doctrine of estoppel *inter partes.* The estoppel under consideration there was a supposed *estoppel in rem.* Counsel in that case had argued that the *findings* had, in respect of estoppel, the same sort of effect as the *judgment*,—viz., *against all the world. That* is the proposition with which the case deals.

And that this is the point of that decision is clearly shown in *Concha vs. Concha:* as this is reported both in 11th Ap-

peals, 541, and in 29th Ch. Div., 268 · a case very elaborately and ably argued and considered. The opinions in both courts were *seriatim*, and unanimous; and rendered by such lawyers as Bowen, Fry, and Baggallay; and, in the House of Lords, Herschell, Blackburn, and Bramwell. A question occurred therein as to the domicil of a certain decedent at the time of his death, and the effect thereupon of a certain finding in probate incidental thereto: it having been contended, (1), that this created an estoppel of the nature of that by the judgment *in rem* which followed; or (2) at all events that, as betwixt certain persons, it created an estoppel *inter partes*.

As to the first point the Court quoted from, and *held* in accordance with *Whicker vs. Hume;* and as to the second, inasmuch as the matter *found* had been of no importance to the decision in the probate court, that such finding—upon elementary grounds—created no estoppel *inter partes;* and besides that, as by recent legislation English courts of *probate* are no longer courts also of *distribution*,—*findings* therein, even *inter partes*, are no longer [as when Bourchier *vs.* Taylor cited by this court in Caujolle's case—*ubi supra*—was decided,] of authority in other courts when exercising, as in the Concha case, jurisdiction in matters of *distribution*.

We quote from the opinion of the Lord Chancellor, 11 App., 548, passages which indicate its drift, as follows:

"It [the finding as to the domicil of the decedent,] is first put as an estoppel *in rem*, conclusive against all the world. That the mere fact that probate of the will was granted, is *not so* conclusive, is established beyond all possibility of question, by the decision of your Lordships' House. In the case of Whicker *vs.* Hume that very point was determined,

and that opinion was expressed by all the noble and learned Lords who advised the House on that occasion. Lord Cranworth says, 'The first question made is one which is extremely important, namely, the point whether probate was or was not conclusive evidence of the *domicil*,' &c., p. 551. * * *

"I pass therefore to the question whether it was an estoppel, as is alleged, *inter partes*" p. 552. * * * "I do not think that it is possible to contend successfully that Adelinda Concha would be conclusively bound by that determination of domicil of the testator unless the appellant would also be bound by it, so that if the decision had been the other way Adelinda Concha might have relied upon that determination by way of estoppel by securing to her the rights which she claimed," p. 553. * * * "It is said that the litigation is a litigation between the same parties. Now, I do not think that in the sense in which that language is used in the case of an estoppel it was really between the same parties so as to bind Adelinda," p. 554. * * *

[And then, after assigning reasons for this,—which turned upon a point of Chilian law,—he notices the case of *Bourchier vs. Taylor*, 1 Bro. P. C., 708, which had been cited as authority to show the existence of estoppel *inter partes*, and adds:] p. 555, bot.: "But it is to be observed, first, that in that case the question as to which he [the legatee] was held bound by reason of the decision against his predecessor in title, was the very point which had to be decided by the Spiritual Court. In the next place it must be remembered that at that time the spiritual court was a court of distribution as well as a court merely to determine the question of the validity of the testament and to grant probate or administration; it was a court of distribution concurrently with the court of chancery. It was said there by the noble and learned Lords in this House that the decision of a spiritual court would determine that question

for all purposes in which it had to deal; it was not merely for the purpose of saying to whom administration should go, but it would also determine it for any subsequent question which would arise in the same case in regard to the distribution of the estate. That finding would be a finding of the spiritual court for both purposes; so that it was impossible to hold that the court of chancery, being merely a court of concurrent jurisdiction for the purpose of distribution, would not be bound by the finding of the spiritual court in the matter of distribution, a finding between the same parties on the very point which in each case had to be determined."

We also observe in this connection that it is a well-ascertained rule for *the effect,—as evidence or when pleaded,*—of competent matter in judicial records from other States,—that such effect is regulated by *their effect in the same way in the other courts of the State from which they come.* And that, in Georgia, as above, this is *conclusive.*

It is therefore respectfully submitted that the record of the Georgia court of probate in question contained matter that as evidence was conclusive betwixt the plaintiffs and the defendant *as to the domicil of the decedent;* and that it was error in the Court of Appeals below to affirm the action of the Orphans' Court in excluding that record as evidence in the caveat before it and thereupon admitting the alleged will of the decedent to probate &c.

S. F. Phillips,
F. D. McKenney,
For the Plaintiffs.

October 5th, 1899.

Extracts from "Code of the State of Georgia," "1882" and "1895."

Constitution, article VI, section 1. (See "Code" of 1895, vol. 2, sec. 5831:) "The judicial powers of this State shall be vested in a supreme court, superior courts, courts of ordinary, justices of the peace," etc.

Article V, section 6. ("Code," etc., vol. 2, sec. 5852:) "The powers of a court of ordinary and of probate shall be vested in an ordinary for each county, from whose decisions there may be an appeal (or by consent of parties, without a decision) to the superior court under regulations prescribed by law."

"Code" of 1895, volume 2:

Ib. "SEC. 4232. Courts of ordinary have authority to exercise original and general jurisdiction of the following subjects-matter:

"1. Probate of wills.

"2. Granting of letters testamentary, of administration, and the repeal or revocation of the same.

"3. Of all controversies in regard to the right of executorship, and the right of administration.

"4. The sale and disposition of the real property belonging to and the distribution of deceased persons' estates.

* * * * * * *

"10. Of all such other matters and things as appertain or

relate to estates of deceased persons, and to idiots, lunatics, and insane persons."

"SEC. 4234. The ordinary can grant administration upon no person's estate who was not a resident of the county where the application is made at the time of his death, or, being a non-resident of the State, has property in said county, or a *bona fide* cause of action against some person therein."

"SEC 3393. Every application for letters of administration must be made to the ordinary of the county of the residence of the deceased, if a resident of this State, and if not a resident of this State, then in some county where the estate or some portion thereof is."

"SEC. 3394. The ordinary must issue a citation, giving notice of the application to all concerned, in the gazette in which the county advertisements are usually published, once a week for four weeks, and at the first regular term after the expiration of that time the application shall be heard, or regularly continued."

"SEC. 4254. Every application made to the ordinary for the granting of any order shall be by petition in writing, stating the grounds of such application, and the order sought" [&c., &c., unimportant here].

"Code" of *1882*:

"SEC. 2383. All wills (except nuncupative wills) disposing of realty or personalty, must be in writing, signed by the

party making the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the testator by three or more competent witnesses."

NOTE.—The present Code of *Georgia* was adopted December 16, 1895. The one immediately preceding was that of *1882*. The above-quoted provisions are however the same in both. But as Mr. Haralson died August 23, 1895, we have referred to the Code of *1882* for the formalities of wills; and to that of *1895* for the regulation of the application herein for letters of administration:—made in April, 1896.

FILED
MAR 5 1900
JAMES H. McKENNEY,
Clerk

No. 168.

Brf. of Phillips & McKenney for P. E.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 5, 1900.

No. 168.

Plaintiffs in Error

ELIZABETH S. OVERBY AND OTHERS, ~~Appellants~~

vs.

FANNIE H. GORDON.

Plaintiffs in Error

BRIEF FOR THE ~~APPELLANTS~~ IN REPLY UPON THE MOTION TO DISMISS.

The statute which authorizes writs of error to this court from the Court of Appeals of the District of Columbia,—so far as here important,—is as follows:

"Any final judgment or decree of the said Court of Appeals may be re-examined, &c., upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of $5,000, &c.; and also in cases, without regard to the sum or value of the matter in dispute, &c., in which is drawn in question the validity of a treaty or statute of—or an authority exercised under—the United States." (Act of 1893, ch. 74, sec. 8,—27 Stats., p. 436.)

There are consequently two well-known grounds, upon either of which, if the corresponding record make suitable showing, a writ of error may be justified: *i. e.* (1), a matter in dispute of more than $5,000 in value; or (2), a drawing in question of the validity of some statute, &c., of the United States.

The motion now in question apparently assumes as beyond doubt, that the *second* of these grounds does not exist here; and thereupon it is rested solely upon a want of proper value by the matter in dispute, viz., of one exceeding $5,000,—as required by the former.

We submit that the present writ may be supported upon either ground.

1. As for that assailed in terms by the motion.

The matter in dispute is, *the probate of a will covering property worth more than $9,000* (p. 11). No question arises, or can be determined, therein as to the several interests of the next of kin. Such determination must await some future and separate original proceeding;—no matter what may be the ending of the present one. The boundary betwixt the latter and those proceedings in which several persons claiming relief by different titles, &c., are joined for convenience in a suit in equity, is more plain than that betwixt a suit by next of kin for *distribution* and such supposed joint suit *for convenience*; and even in the latter case,—by next of kin for distribution,—it is held that the matter in dispute is *the*

whole estate. Much more strikingly is the-whole-estate such in a mere matter of *probate*.

As *an illustration* of a principle, we therefore submit that the present case concludes *a fortiori*, when compared with those either directly before this court or cited in New Orleans R. Co. *vs.* Parker, 143 U. S., 42, 51.

2. And even if the point submitted by our learned friends as above were against us, we should contend with confidence that *the present case draws in question the validity of a statute of the United States.*

We have at this point no temptation to differ with, or refine upon, that series of cases in which this court has shown that mere honest misconstruction, or casual indirect disparagement, of some United States statute, is not that *questioning of validity* required by the act above quoted.

But it has never been intimated at any point in that series, as we submit, that an evisceration of a statute may not, within that act, be its invalidation.

All of the parties to the caveat below, excepting Mrs. Overby, (and she had not resided within the District, and is besides a caveator,) are long-time and well-known residents of Georgia; and all of them as well as the supposed testator were born there, and the latter also had died there. A question arose after such death whether the deceased, who originally, during President Cleveland's first administration, had come to Washington to take office,—had not by remain-

ing here after his loss of place, *changed his residence* from Georgia to the District of Columbia.

The supposed will was propounded for probate in this District by one of the next of kin who was, substantially, its sole beneficiary; and the necessary orders were taken for making all other of these parties thereto. Accordingly, upon being notified they came in, and made substantially but one *issue*, viz., that the deceased at the time of his death was not a resident here, but a resident of Georgia.

As is well known, there is no system of formal pleading in courts of probate; and a proper way of pleading to the jurisdiction is by an issue like that just mentioned,—there as here having stated the matter both *negatively*,—as to the District; and *affirmatively*,—as to Georgia.

Whilst such issue was pending, (which assailed *directly* the jurisdiction *of the District itself*, and only through this that *of the court*,) one of the caveators resorted to the territorial jurisdiction asserted by these in the issue below,—and to the county in which the propounder then was, and for a long time had been, a prominent resident,—and in which the deceased had long lived before coming to the District of Columbia,—and in counties neighboring to which the caveators were living, as above; and took due steps for a reassertion there of the contention set up by them in the District,—and after due process of law challenged the propounder upon the same, and then duly applied for a finding in accordance with his suggestion:—whereupon in due course such finding was made, viz., that the deceased had died a resident of that county and State; and this was fol-

lowed by an appointment of the applicant as general administrator. *This proceeding, finding, and judgment has never been reversed, or even directly assailed.*

A proper transcript thereof having subsequently been offered in evidence upon the trial of the same issues in the court below, the learned justice presiding excluded it, upon the ground, as we understand it,—that whilst the record if admitted would necessarily have been fatal to the propounder's allegation of a residence within the District; yet, inasmuch as the applicant in Georgia had not upon such application informed the court there of the existence of the proceeding to which he had been made, and then was, a party *in invitum* within such District, some fault was thereby to be attributed to him such as would prevent his availing himself of that transcript,—and of its *faith and credit.*

(Our learned friends, in an appendix to their brief, have presented the language used by his honor on making the exclusion,—and we refer to that in correction of any misunderstanding that may chance to exist in our report of its substance, above.)

With all respect to the learned court below, we submit that a *preliminary* question arose upon the Georgia record, that excluded any consideration, or even suggestion, of the fault supposed.

Because, a judgment by default properly awarded (*here*, by a Georgia court of *superior* jurisdiction) is one that, as has been said, in substance, in the case of Last Chance Co.

vs. Tyler Co., 157 U. S., 683, quoted in our former brief, pages 13, 14,—is to be taken, as against the party defaulted, and in judgment, as being of no less weight for all matters substantial to its validity,—than if such party had appeared, and pleaded, and otherwise had ransacked the case of the successful party by every means within his power.

The present plight of the defendant in error is therefore not to be distinguished from one in which the finding in Georgia had been made after personal appearance, and strenuous contest upon her part.

It seems inconceivable that any fault or slyness, or contempt, is imputable to the caveators or any of them, because of their having openly challenged the propounder to maintain anew the issue of *residence* betwixt them, within a vicinage *common and even native, to all of them.* They had every reason to anticipate that such challenge would be accepted, and put to all possible proof. And it appears to have been, *at least*, as much the duty of the defendant in error to have alleged and proved within Georgia such pending proceeding in this District, as it was that of the plaintiffs in error.

We submit therefore that the action of the learned court below,—for all of its tone, and intention, no doubt of deference,—went to a direct invalidation of the statute in question: being in effect a confession and avoidance of its operation, as it were, which in point of principle is irreconcilable with wholesome allowance thereof.

The "comity" alluded to below in this connection is, as will be noticed, not *comity* betwixt courts of the same political jurisdiction, but betwixt different political jurisdictions themselves,—a shadowy thing at best in the face of an adverse transaction upon record (not *in fieri*, but already *factum*,) in a superior court of justice.

Records like that of the court in Georgia, of a matter already in judgment, cannot be made less of by suggesting doubts arising out of comity. Upon any such suggestion it would be assumed by other courts (*not of appeal*, at least,) that something had appeared before the court of the record, that had properly prevented an exercise of comity. This, as well as every other conceivable matter in support of the default, is to be taken for granted.

And as *local* jurisdictions within the United States are not to be allowed to build up, or even entertain, *local* customs in derogation of provisions by statutes of the United States,—much less can one such jurisdiction, by attributing to another like jurisdiction the existence of a certain comity,—to be exercised,—even although not demanded by any party to the case,—thereby make a footing for itself to disregard a *general* national institution of so great value to the purposes of private justice as that designated by the *faith and credit*" provisions of the Constitution of the United States, and section 905 of the Revised Statutes.

We therefore submit that even had the first ground of appeal failed us, the record shows a drawing in question of the validity of a statute, injurious to us in the courts below.

The other matters in contention we leave as presented by the former brief for the appellants: calling attention as well to the circumstance that we have not assigned *error* here in respect of the *alignment* below. That point was made in the supreme court of the District in deference to certain cases in the Maryland Reports which, upon the general statute held that caveators are quasi-plaintiffs. But after the Court of Appeals affirmed the ruling at trial, we were satisfied; and have not brought that matter up.

S. F. PHILLIPS,
F. D. MCKENNEY,
For the Plaintiffs in Error.

FEBRUARY 27, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 168.

ELIZABETH S. OVERBY, LEONORA H. PACE, KATE CULBERSON, PAUL BLECKLEY, LOGAN BLECKLEY, AND HARALSON BLECKLEY, PLAINTIFFS IN ERROR,

vs.

FANNIE H. GORDON, DEFENDANT IN ERROR.

Now comes the defendant in error, Fannie H. Gordon, and moves the court to dismiss the writ of error in the above-entitled cause for want of jurisdiction, because the interests of the plaintiffs in error in respect of the judgment of the Court of Appeals of the District of Columbia, to which said writ of error was directed, are several, and the matter in dispute, exclusive of costs, as to no one of the said plaintiffs in error exceeds the sum or value of five thousand dollars.

HENRY E. DAVIS,
CHAS. COWLES TUCKER,
Attorneys for Fannie H. Gordon, Defendant in Error.

To SAMUEL F. PHILLIPS and FREDERIC D. MCKENNEY.

SIRS: Please take notice that at the hearing of the above-entitled cause the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court thereon. Annexed hereto is a copy of our brief or argument in support of said motion.

HENRY E. DAVIS,
CHAS. COWLES TUCKER,
Attorneys for Fannie H. Gordon, Defendant in Error.

Brief or Argument in Support of the Foregoing Motion.

I.

STATEMENT OF THE CASE.

Hugh A. Haralson, late of the District of Columbia, deceased, died at Kirkwood, county of De Kalb, State of Georgia, on the 23d day of August, A. D. 1895, leaving surviving him, as his next of kin, the plaintiffs in error and the defendant in error as follows: (1) The plaintiff in error Elizabeth S. Overby, a sister; (2) the defendant in error, a sister; (3) the plaintiff in error Leonora H. Pace, a sister, and (4) the plaintiffs in error Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, the children of a deceased sister, Caroline C. Bleckley (Record, pp. 4–5).

The respective interests of the plaintiffs in error in the estate of the said decedent are accordingly as follows: Mrs. Overby, one-fourth; Mrs. Pace, one-fourth, and the remaining four, one-sixteenth each. The estate of the decedent did not exceed in value nine thousand two hundred dollars (Record, p. 11). The respective interests of the plaintiffs in error in the premises accordingly are not to exceed the following

sums: Mrs. Overby and Mrs. Pace, twenty-three hundred dollars each, and the remaining four plaintiffs in error not to exceed five hundred and seventy-five dollars each.

II.

ARGUMENT.

Manifestly, the interests of the several plaintiffs in error in the premises are separate, and under the repeated decisions of this court the writ of error should be accordingly dismissed. It is deemed necessary only to refer the court to the following cases, which, with the cases therein cited, set forth all of the court's adjudications on the point involved:

Henderson v. *Wadsworth*, 115 U. S., 264.
Gibson v. *Shufeldt*, 122 U. S., 27.
Clay v. *Field*, 138 U. S., 464.

The argument may be summarized in the following extract from the opinion of this court in the last-named case (pp. 479–480):

> "Many other cases stand in the same category, but they are referred to and commented on in the cases cited. The general principle observed in all is that, if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities *arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered*, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

And in *Gibson* v. *Shufeldt*, which is said by the court to be "exactly like *Stewart* v. *Dunham*" (115 U. S., 61), the court says (p. 39):

> "The sole matter in dispute, therefore, is between the defendant and *each* plaintiff as to the amount which the latter shall recover; and the motion to dismiss the appeal as to all the plaintiffs except the one whose debt exceeds $5,000 must be granted."

The Case on the Merits.

STATEMENT OF FACTS.

Hugh A. Haralson died in Kirkwood, De Kalb county, Georgia, August 23, 1895. On August 14, 1895, he executed a paper-writing purporting to be his last will and testament, by the terms of which he disposed of certain bonds of the value of about $9,000, the beneficiaries named in the will being his sister, Fannie H. Gordon, and his niece, Carrie Lewis Gordon. These bonds at the time of Haralson's death were on deposit in the city of Washington, D. C. The paper-writing purporting to be a will, having but one witness, was invalid as a will of personalty in the State of Georgia, but was valid as such a will in the District of Columbia.

On January 23, 1896, Fannie H. Gordon filed a petition in the supreme court of the District of Columbia, holding a special term for orphans' court business, praying for the admission of the paper-writing to probate and record as the last will and testament of Hugh A. Haralson and the granting of letters *cum testamento annexo* upon his estate.

On March 6, 1896, Elizabeth S. Overby and others, as next of kin of Hugh A. Haralson, other than Fannie H. Gordon, filed a caveat alleging that the paper-writing was not the last will and testament of the deceased, and that the deceased was not at the time of his death a resident of the District of Columbia, but a resident of the State of Georgia.

On April 10, 1896, issues were framed in the orphans court of the District of Columbia as follows:

> "1. Was the said deceased at the time of his death a resident of the District of Columbia?
> "2. Was the said deceased at the time of his death a citizen and resident of the State of Georgia?
> "3. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament a resident of the District of Columbia?
> "4. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament a citizen and resident of the State of Georgia?
> "5. At the time of his death did any considerable part of the personal estate of the said deceased lie within the District of Columbia?"

And these issues were certified for trial by jury.

In February, 1898, trial of these issues was had in the circuit court, and on February 10, 1898, the jury found that Hugh A. Haralson was a resident of the District of Columbia, and that at the time of his death a considerable part of his estate did lie therein.

In the course of the trial it developed that on April 6, 1896—one month after the filing of the caveat and four days before the framing of the issues in the probate proceedings in the District of Columbia—Logan Bleckley, one of the caveators, had filed a petition in the court of Ordinary for De Kalb county, Georgia, alleging that Hugh A. Haralson at the time of his death was a resident of Georgia, and praying for letters of administration upon his estate; and on May 4, 1896, twenty-eight days later, the last-named court passed an order appointing Logan Bleckley administrator of the estate.

At the same time was filed in that court a request on the part of the next of kin of the decedent, other than Fannie H. Gordon, for the appointment of Bleckley as administrator, and the husbands of two of the next of kin and one of the

next of kin signed Bleckley's administration bond as sureties.

There is nothing in the record of the proceedings in the trial in the supreme court of the District of Columbia to show that Fannie H. Gordon had any knowledge whatever of the proceedings in De Kalb county, Georgia; and there is nothing in the said proceedings to show that she had such knowledge: on the contrary, those proceedings show on their face that the order of appointment therein made was made upon notice by publication only (Rec. 11, *fol.* 12).

Although, as stated above, the estate which Hugh A. Haralson endeavored to bequeath by his will, at the time of his death and at the time of the filing by Mrs. Gordon of her petition in the orphans' court of the District of Columbia, lay in the District of Columbia, and was, therefore, then within the jurisdiction of that court, Logan Bleckley, after the filing of the caveat to which he was a party, and after the framing, at his and his co-caveators' instance, of the issues which were to determine the residence of the deceased, secured possession of the estate from its custodian in the District of Columbia, and removed it from the District of Columbia, claiming to act as administrator under grant of the letters issued by the Georgia court.

There is nothing to show that Mrs. Gordon or her representatives had any knowledge of this act of Bleckley in taking possession of the estate and removing it from this jurisdiction.

At the trial in the circuit court that court refused to admit in evidence certified transcripts of the record of the Georgia court, which were offered by the caveators to show that the question whether Hugh A. Haralson was a resident of the District of Columbia was *res judicata*: the court excluding them upon the ground that the proceedings in the Georgia court, instituted by the caveators at a time when proceedings to which they were also parties were pending in the orphans' court here, involving the identical question of

the residence of the decedent, were practically a fraud upon the latter court and should be disregarded by it. The opinion of the trial court (Mr. Justice Cole) is set out in an appendix to this brief.

The refusal of the court to admit this evidence forms the assignment of error here.

There was one other assignment of error in the Court of Appeals, namely, whether the trial court erred in assigning to the propounder of the will, Mrs. Gordon, the position of plaintiff in the trial, and to the caveatees the position o defendants, and at the same time ruling that the caveatee, as plaintiff, should lead in the introduction of proof and have the right to open and close to the jury. We discuss first the second question, namely:

I.

Did the Trial Court Err in Its Alignment of the Parties?

The defendant in error, in her petition for the probate of the will, alleged that the deceased at the time of his death *was a resident of the District of Columbia*, that the paper-writing she produced *was the will of the deceased*, and that *all of his estate except an insignificant part was in the District*.[1] The

[1]Act of Assembly of Md., 1798, ch. 101, subch. 2, sec. 5:

"Any will or codicil containing any disposition relative to goods, chattels, or personal estate, may be proved in the county where most of the witnesses reside, or in the county in which letters testamentary or of administration may be granted."

Id., ch. 101, subch. 5, sec. 2:

"Whenever any person hath died intestate, leaving in this State goods, chattels, or personal estate, letters of administration may be forthwith granted by the orphans' court of the county wherein was the party's mansion-house or residence; or in case he or she had no mansion or residence within the State, letters shall be granted in the county where the party died; and in case the party neither had mansion or residence, nor died within the State, letters may be granted in the county wherein lies, or is supposed to be, a considerable part of the party's personal estate."

plaintiffs in error in their caveat denied the allegation of residence, and also stated that the paper-writing was not the last will and testament of the deceased. The issues certified by the orphans' court were framed with a view of securing a determination of the two questions: (1) of the residence of the deceased, and (2) whether at the time of his death any considerable part of his estate lay in this District.

Plainly, therefore, the burden of proving affirmatively the allegations of her petition was on the defendant in error, before the orphans' court could admit the will to probate. Those allegations were denied by the plaintiffs in error as caveators. The *factum* of the will was in dispute. A careful examination of the Maryland cases cited by the plaintiffs in error on the argument below will disclose the fact that in most, if not all of them, the real issue between the parties was not as to the existence of the will, but as to its validity as a testamentary paper.

In the case of Yingling *vs.* Yingling, 16 Md., 112, an executor had presented a claim against the estate of his testator, and the distributees of the estate had contested the claim, alleging its invalidity. Issues were framed accordingly, and the Court of Appeals (p. 120) said:

> "In cases of this kind we think the party *propounding* the claim should appear as plaintiff in the trial of the issues. The party applying for the issues is not entitled to be plaintiff, though in one sense he may be considered an actor in the proceeding. Here the matter to be established is the appellee's claim against his testator. He could not sue himself, nor initiate proceedings with a view to issues at law. He did all that, in the first instance, the law requires; he proved his claim and offered it for allowance in his account as executor, and when contested he ought not to be deprived of the advantage of position which the burden of establishing the claim would give any other creditor of the estate. The cases referred to by the appellants do not apply as closely as their counsel contend they do. In

Brooke *vs.* Townshend, 7 Gill., 25, the *factum* of the will was not in issue. Conceding its existence, but denying its validity, the caveators assailed it, on the ground of want of capacity, &c. There was something on which they could commence their contest, and might well claim the opening and conclusion. In cases of justification pleaded, payment, &c. (Kearney *vs.* Gough, 5 G. & J., 457), the plaintiff opens by showing that his case is admitted by the pleadings of his adversary. But here, the claimant must commence, if the case proceeds at all, unless the appellants begin by admitting the *prima facie* proof of the demand, by reading the account and affidavit and its passage by the orphans' court, and then assume the burden of disproving it, a position we assume they would be unwilling to occupy. *The general rule is that the party holding the affirmative of the issue must take the burden of proof, and, under the circumstances in which the issue is presented here, the claimant ought to open and conclude.*"

It should be observed that there is no attestation clause to Haralson's will, and that, as the record shows, the defendant in error assumed the burden of proving its execution by the witness Macatee (p. 2), and did prove it by taking his deposition. And having alleged in her petition that deceased was a resident of the District, she was obliged to prove that jurisdictional fact. The plaintiffs in error in their caveat denied both the existence of the will and the jurisdictional fact. Can it be doubted that the orphans' court would have denied probate of the will unless both its execution and the residence of the decedent were proved?

It is a presumption of law that a testator when he makes his will is sane, and one who asserts to the contrary has the burden of proving his assertion. But it cannot be said that it is a presumption of law that the District of Columbia was the last residence of every testator whose will is there offered for probate. That is an affirmative matter which must be alleged and proved.

No case in this District can be found wherein this precise point has been adjudicated. It has long been the practice, however, in will contests, where the *factum* of the will is denied by the caveators, as distinguished from its invalidity upon the ground of fraud, insanity, undue influence, etc., to make the caveatee plaintiff, the burden of proving the will being upon him. So it was in the very recent case of Throckmorton *vs.* Holt, 12 App. D. C., 552. In that case there was no attestation clause to the will, and forgery was alleged. The caveatees were made plaintiffs and opened and closed to the jury. The caveators admitted, as will be seen from the opinion of the court, that the alignment of the parties, under the circumstances, was discretionary with the trial court.

But to cut short the discussion and dispose of this question, it is necessary only to quote the following language of this court in the case of Lancaster *vs.* Collins, 115 U. S., 222:

> "It is also assigned for error that the court refused to permit the counsel for the plaintiff to make the closing argument to the jury, the contention on the part of the plaintiff being that the affirmative was with him. But this is purely a question of practice, to be reviewed only by a motion for a new trial in the trial court, and is not the proper subject of a bill of exceptions or of a writ of error, because it does not affect the merits of the controversy."
>
> Day *vs.* Woodworth, 13 How., 363, 370.
> See, also, Hall *vs.* Weare, 92 U. S., 728.

II.

Did the Trial Court Err in Its Refusal to Admit in Evidence the Record of the Georgia Court of Ordinary ?

As heretofore stated, the one object of the plaintiffs in error in offering this evidence was to show that the question whether Hugh A. Haralson was a resident of the District of Columbia at the time of his death was *res judicata*, and that the defendant in error was estopped to assert otherwise (R., p. 14).. The Georgia court's order of May 4, 1896, appointing Logan Bleckley administrator, recited that the decedent "died a resident of said county [De Kalb Co., Georgia], intestate," and, of course, if the determination of that question was binding on the courts of this District, under the circumstances, nothing would have been left for the lower court to do but to direct the jury to find that the decedent, at the time of his death, was not a resident of this District.

It is true that the Chief Justice of the Court of Appeals in his dissenting opinion (p. 27 of the Record) says—

> "that the transcript of the record of the Georgia court was offered by the caveators as tending to show that the deceased had died a resident of the said county of De Kalb, intestate, and that the caveatee was thereby estopped to deny these facts. But the court below rejected the record *in toto* and would not admit it for any purpose, and the caveators excepted. The only question, therefore, presented on this appeal is as to the admissibility of that record. * * * It may be that the effect attributed to the judicial proceeding in Georgia, in the offer made, was too broad and conclusive and I think it was so. But while the record may not operate as an estoppel on the question of domicile, it does not follow that it should have been rejected as furnishing no evidence whatever."

But we submit that the record of this case shows that the plaintiffs in error offered the Georgia record solely on the ground that it was an estoppel upon the defendant in error, and not simply as evidence tending to show that the decedent was domiciled in Georgia, to go to the jury for what it was worth. The ground of the objection of the defendant in error to its admissibility was that it was offered as an estoppel upon her, and the ruling of the trial justice, whose opinion is appended to this brief, shows clearly that the record was offered for no other purpose. The majority of the members of the Court of Appeals so understood the offer, for in their opinion they say (Record, pp. 19, 20): "We understand that they [the plaintiffs in error] rely upon the decree of the court of ordinary as a conclusive estoppel against the proceedings in this jurisdiction. The question, then, is whether that decree does operate as such an estoppel." There is nothing whatever in the opinion of the trial court or in the record of this case to show that the offer would have been rejected if it had been made for the purpose for the first time in the history of the case suggested by the Chief Justice. Indeed, the plaintiffs in error, at the top of page 20 of their brief, utter an emphatic protest against the suggestion of the Chief Justice that the Georgia record, although competent, was not conclusive as evidence of the facts found therein, and nowhere in their brief do they contend that the record was offered for any other purpose than to estop the defendant in error and to show that the question involved, namely, the domicile of the decedent, was *res judicata*. The plaintiffs in error do, on page 10 of their brief, intimate that the record may contain "an admission therein made by a party to such pending suit that is offered." If this means that the record should have been admitted in evidence as containing an admission on the part of the defendant in error, we say, first, that it was not offered for that purpose, but as an estoppel, and was resisted by the defendant in error, and

ruled out by the trial court solely on that ground, and, secondly, that no admission on the part of the defendant in error, express or constructive, could be evidence whether the deceased was or was not a resident of a particular place at the time of his death. No declarations, acts, or admissions on her part could bind the estate of the deceased or the beneficiaries named in the will, *of which she is but one.* Indeed, if she had in so many words declared that the deceased was a resident of Georgia at the time of his death, her statement would have involved a conclusion of law on her part, and would have been incompetent and inadmissible in evidence. Questions of residence and domicile of decedents are questions of law, to be determined from the acts, conduct, and declarations of the decedents and not from acts, conduct, or declarations of others.

The contention of the defendant in error is, first, that the supreme court of the District of Columbia, holding a special term for orphans' court business, having first taken cognizance of this cause, had the exclusive right to entertain and exercise such jurisdiction to the final determination of the cause, and, secondly, that the plaintiffs in error, having appeared in the cause and submitted to the jurisdiction of that court, perpetrated a fraud both upon that court and the Georgia court in subsequently raising in the latter court the precise question which was pending undetermined in the former court, and that the rule of comity between judicial tribunals was thus violated.

(*a.*) Upon the first proposition we cite—

Ex parte Chetwood, 165 U. S., 443.
Ex parte Rhodes, 48 La. Ann., 1363.
Craig v. *Hoge*, 95 Va., 275.
Ober v. *Gallagher*, 93 U. S., 199.
Merrill v. *Lake*, 16 Ohio St., 373.
Booth v. *Ableman*, 16 Wis., 460.
Ex parte Bushnell, 8 Ohio St., 599.
Clepper v. *State*, 4 Tex., 242.

Story's Eq., 64*k*.
Slyhoof v. *Fliteraft*, 1 Ashm., 171.
Taylor v. *Carryl*, 20 How., 583.
Peck v. *Jenness*, 7 How., 612.
Smith v. *M'Iver*, 9 Wheat., 532.
Peale v. *Phipps*, 14 How., 368.
Shelby v. *Bacon*, 10 How., 56.

(*b*.) Upon the second proposition, we ask the attention of court to the following cases:

Where a suit involving conflicting liens and mortgages on certain property is instituted in one court, and all persons in interest are made parties to the suit, the subsequent institution of another suit in a different court by two of the parties is a fraud on justice, and will not divest the former court of jurisdiction to determine all the issues between the parties, in respect of the mortgaged property, without regard to any changes in the title or possession of the property.

Barkdull v. *Herwig*, 30 La. Ann. (Part I), 618.

Where a court of general jurisdiction, and legally competent to determine its own jurisdiction, has acquired jurisdiction *de facto* over person or subject-matter, it is a rule, founded upon comity between judicial tribunals, that no court will interfere with or seek to arrest the action of the court in which and while the case is still pending and undetermined.

Ex parte Bushnell, 8 Ohio St., 599.

Where a petition has been filed by the proper parties before the board of county commissioners for the incorporation of a town, and the petition conforms to the requirements of the statute, it is the duty of the commissioners to hear the proofs, and, if satisfied that the requirements of the law have been complied with, to make an order declaring that the territory embraced in the petition shall, with the assent of the qualified voters thereof, be an incorporated town, by the name specified in the petition; and after the election has been properly certified by the inspectors of

the election, it is the duty of the commissioners to make an order declaring that such town has been incorporated by the name adopted.

The pendency of such a petition gives the county commissioners jurisdiction of the subject-matter thereof, and that jurisdiction cannot be ousted by the adverse action of the city council. Where there exist two tribunals, possessing concurrent jurisdiction of a subject-matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted.

Taylor v. *The City of Ft. Wayne et al.*, 47 Ind., 274.

While a petition of the mayor and aldermen of a city in which a railroad crossing is situated, and of the directors of the railroad corporation to the county commissioners for an alteration of the crossing, so as to allow the highway to pass under the railroad, is pending, the mayor and aldermen are not authorized to join with the common council in changing the grade of the highway at the same place, even with the consent of the railroad corporation. The jurisdiction of the county commissioners, having first attached to the subject of the alteration, necessarily excluded the jurisdiction of any other tribunal over the same subject until these proceedings were ended.

"*And*," says the court:

> "*That principle applies with peculiar force to this case, in which the mayor and aldermen, after joining with the directors of the railroad corporation in invoking the action of the county commissioners, have undertaken, with the assent of the same corporation, and the concurrence of the common council, to nullify and defeat by their own act the proceedings which they had set in motion.*"
>
> *Powers* v. *City Council of Springfield*, 116 Mass., 84.

And also:

> "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause; and when the juris-

diction of the court and the right of the plaintiff to prosecute his suit has once attached, that right cannot be arrested or taken away by proceedings in another suit. These rules have their foundation not merely in comity but in necessity; for if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable for a process for contempt in one, if they dare to proceed in the other."

Peck v. *Jenness*, 7 How., 624, cited in *Taylor* v. *Carryl*, 20 How., 596.

"Filing by order of a Federal court of a bill for a receiver is sufficient to give priority of jurisdiction over the property as against a subsequent garnishment under process of a State court, although this was issued before service upon the defendant in the suit for a receiver, if a receiver was appointed in due time."

Rusner v. *Railroad Co.*, 89 Tex., 656.
Zimmerman v. *So Relk*, 80 Fed. R., 417.

"The county court of one county having full jurisdiction of the subject-matter and the person of a guardian and his wards, cannot be ousted of jurisdiction of a proceeding to compel such guardian to give a new bond, by the latter getting himself appointed guardian in another county."

Wackerle v. *People*, 168 Ill., 250 (48 N. E., 123), rev'g 65 Ill. App., 423.

"When two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced should be allowed to retain jurisdiction until the litigation is settled."

Jenkins v. *Simms*, 45 Md., 532.

"This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres and over the same subjects and persons. The only course of safety, therefore, is, when one court having jurisdiction over the subject, has possession of the case, for all others

with merely co-ordinate powers to abstain from any interference. Any other rule will unavoidably lead to perpetual collision and the production of the most calamitous results."

Brooks v. *Delaplaine*, 1 Md. Ch., 351.

On page 18 of the brief of the plaintiffs in error it is said:

"The orphans' court below has at no time had *possession*, either actual or constructive, of the assets of the decedent. If at the initiation of the caveat, or some other time, it had appointed an administrator *pendente lite* this might have been otherwise. But no application was made for such appointment, or for any other action looking to the taking charge of such assets.

"Accordingly, *Heidritter's case*, and the six others, referred to together upon page 22, top, of the record [in the majority opinion of the Court of Appeals] do not support the suggestion in that connection—of an improper interference by the court of ordinary in Georgia—or by parties litigant therein, with a *res* then in the custody of the orphans' court here. For in every one of those cases the *res* in question was in the possession of some receiver, marshal or other official of the court that had been interfered with."

We can best reply to this contention in the language of Judge Thayer in the well-considered case of *Merritt vs. American Steel Barge Co.*, 88 Fed. Rep., at page 31. In the opinion in that case, after pointing out that the doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property by mesne or final process or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired; that the possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-

ordinate jurisdiction from exercising a like power, the court says:

> "The doctrine in question is not limited in its application to cases where property has *actually* been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court *may* be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to Federal and State courts, being the outgrowth of necessity is 'a principle of right and of law' which leaves nothing to the discretion of a court, and may not be varied to suit the convenience of litigants" (*Gates vs. Bucki*, 12 U. S. App., 69; 4 C. C. A., 116, and 53 Fed., 961; *Chittenden vs. Brewster*, 2 Wall., 191; *Orton vs. Smith*, 18 How., 263, 265; *Union Trust Co. vs. Rockford, R. I. & St. L. R. Co.*, 6 Biss., 197; 24 Fed. Cas., 704; *Owens vs. Railroad Co.*, 20 Fed., 10; *Union Mut. Life Ins. Co. vs. University of Chicago*, 6 Fed., 443).

That the pendency of a suit strictly *in personam* has not the effect of preventing a party to that suit from bringing a suit in another jurisdiction involving the same issue, and from pleading the judgment there recovered as an estoppel in the former action, must be conceded, for the question has been so decided by this court in *Stanton vs. Embrey*, 93 U. S., 548 (cited by the plaintiffs in error), and in *Insurance Co. vs. Harris*, 97 U. S., 331; but if the prior action deals either actually or potentially with specific property or objects—is either a proceeding *in rem* or *quasi in rem*—the court first obtaining jurisdiction cannot be ousted of it by another

court. As Mr. Justice Miller, in *Buck vs. Colbrath*, 3 Wall., at page 345, says:

> "In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought and the identity of the parties in the different suits."

In that case it was held that an action of trespass against a United States marshal for taking goods does not come within the principle of *Freeman vs. Howe*, 24 How., 450, which decided that property held by a United States marshal under a writ of replevin from a Federal court could not be lawfully taken from his possession by any process issuing from a State court.

It would seem to be a useless consumption of space to argue and cite authorities in this brief to the effect that proceedings in an orphans' court to obtain letters testamentary or letters of administration are proceedings *in rem* and not *in personam*, especially as it is conceded by the plaintiffs in error that the estate of the decedent in this case, consisting of about $9,000 in stocks and bonds, was in the District of Columbia at the time that the petition for letters of administration *c. t. a.* was filed, at the time the plaintiffs in error filed their caveat, and at the time the issues were framed and certified for trial by jury. Indeed, the whole argument of the plaintiffs in error is based upon the initial proposition that the decree of the Georgia Court of Ordinary having been rendered in a proceeding *in rem* and not a proceeding *in personam*, is conclusive as against the world. This contention involves a distinct recognition of the fact that a proceeding to obtain letters of administration upon a decedent's estate is a proceeding *in rem*.

HENRY E. DAVIS,
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APPENDIX.

Opinion of the Trial Court (Justice Cole) upon the Question of the Admissibility of the Record and Proceedings of the Georgia Court.

The COURT: This question is not without its difficulties. These questions are always difficult, especially in a case like this, which is a *quasi* proceeding *in rem*, affecting the estate of a decedent, and especially where that estate is within the jurisdiction of the court which first obtains jurisdiction. I think it is a violation of that principle of judicial comity for any other jurisdiction to attempt to forestall the action of this. The proceeding in Georgia, I think, was a violation of that principle of judicial comity, and I think if the Georgia court had been informed that this question was pending here, and that the property was within the jurisdiction of this court, and that the parties who applied for administration there had appeared in this court and raised the question here, it would not have proceeded in the matter, but would have said it would await the adjudication here. I am sure this court would have done that, and I think the Georgia court would have done it if it had been brought to its attention.

The real question here is whether this court has jurisdiction. That is the real question raised by the petitioner, and the caveatee, and by the issues framed here—whether this court has jurisdiction to appoint an administrator; that is the real question before this jury.

I cannot conceive that while that question is pending here, and this court is about to proceed to determine the question of whether it has jurisdiction to appoint an administrator, the Georgia court, if it had been aware of the

pendency of that question here, would have undertaken to decide that question for this court. That is what it has done, and if we should admit this record and give it the force and effect which is claimed for it under the Constitution, it would be the Georgia court coming in and determining, while this court had the matter under consideration, whether this court had jurisdiction to proceed or not. If I were going to hold that way I should want some controlling authority, and I do not see it, and my best judgment is that, under the circumstances, this case is distinguishable from the Gorman case for the reason that the party appointed administrator in a foreign jurisdiction was before this court at the time he was appointed and knew this proceeding, and ought not to have applied to the Georgia court, and I think the duty of this court is to reject that record on that ground—not on the ground that the Georgia court did not have jurisdiction—because I think under the decision of the Court of Appeals that decision would hold, and, going by that decision, I think I would be bound to hold that the Georgia court had jurisdiction to proceed. But I think we ought not to recognize its judgment in this case, because it would be substituting the duty of the Georgia court for this court upon the question of this court's jurisdiction.

I do not think that can be done. I think this court must go on and determine whether it has jurisdiction in this matter or not, and whether it has jurisdiction or not depends upon the question of fact as to whether Mr. Haralson was a resident of the District of Columbia or of Georgia when he died, and I think we must determine that question for ourselves.

I will therefore reject that record and allow an exception, and we will go to the jury with the question.

Statement of the Case.

OVERBY *v.* GORDON.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 168. Argued March 5, 1900. — Decided April 9, 1900.

The amount of the estate, as a whole, was the matter in dispute below, and it amounted to sufficient to give this court jurisdiction.

The sovereignty of the State of Georgia, and the jurisdiction of its courts at the time of the grant of letters of administration on the estate of Haralson did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia; and while the De Kalb county court possessed the power to determine the question of the domicil of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, it did not possess the power to conclusively bind all the world as to the fact of domicil, by a mere finding of such fact in a proceeding *in rem*.

Pending proceedings for the appointment of an administrator in the District of Columbia, the personal assets of the deceased there situated were delivered up to the administrator appointed by the Georgia court. The trial court declined to rule that their delivery operated to protect those who made it as against an administrator appointed within the District. *Held* that this was a proper ruling.

The act of Congress of February 28, 1887, c. 281, has no relation to a case of this kind.

THE proceedings under review originated in the Supreme Court of the District of Columbia, by the filing in that court, on January 23, 1896, of a petition on behalf of Mrs. Gordon, the appellee herein. The object of the petition was to obtain the probate, as the last will and testament of Hugh A. Haralson, of a paper purporting to have been executed by Haralson, a copy of which is set out in the margin hereof,[1] and to obtain

[1] SAVANNAH, GA., *August* 14, 1895.

It is my will and desire that after my death the interest on my bonds be for the sole use and benefit of my sister Mrs. Fannie Gordon, and that after her death the interest on my bonds be for the sole use and benefit of her daughter and my niece Carrie Lewis Gordon.

It is my will and desire that none of my securities be sold or the investment changed until they mature.

a grant of letters of administration thereon, with the will annexed. It was averred that Haralson, at the time of his death and for several years prior thereto, had been a resident of the District of Columbia, and that he died on August 23, 1895, in the county of De Kalb, State of Georgia, possessed of personal property of the value of about ten thousand dollars, all of which, except an insignificant part thereof, was at the time in the District of Columbia. It was further averred that Haralson left surviving, as next of kin, three sisters, and four children of a deceased sister, and that all said next of kin, except the eldest sister (Elizabeth S. Overby), resided in the State of Georgia. Subsequently, on March 6, 1896, a caveat was filed, purporting in the body thereof to be on behalf of all the next of kin of the decedent other than Mrs. Gordon, but not signed by Mrs. Overby, contesting the validity of the alleged will and the claim that the deceased was at the time of his death a resident of the District of Columbia, and averring that at the time of his death Haralson was a citizen and resident of the State of Georgia.

On April 10, 1896, issues were framed upon the matters put at issue by the caveat and were ordered to be tried by the court, sitting as a Circuit Court, and a jury. The questions presented for decision were as follows:

"1. Was the said deceased at the time of his death a resident of the District of Columbia?

"2. Was the said deceased at the time of his death a citizen and resident of the State of Georgia?

"3. Was the said deceased at the time of the making of the paper writing purporting to be his last will and testament a resident of the District of Columbia?

"4. Was the said deceased at the time of the making of the paper writing purporting to be his last will and testament a citizen and resident of the State of Georgia?

"5. At the time of his death did any considerable part of

If Carrie Gordon should have no children at her death, these securities, with the residue of my estate, to be divided to my heirs at law.

HUGH HARALSON.

Witness: CHAS. A. MACATEE.

the personal estate of the said deceased lie within the District of Columbia?"

A trial of these issues, however, was not had until February, 1898. At said trial the caveators were represented by attorneys. From a bill of exceptions contained in the record before us it appears that Mrs. Gordon introduced evidence tending to show that both at the date of the testamentary paper in controversy and at the time of his death Haralson was a resident of the District of Columbia. Mrs. Gordon rested her case after the following admissions were made by counsel for caveators:

1. That at his death Haralson had on deposit in two banking institutions in the District of Columbia money and securities approximating nine thousand dollars in amount and value, which was the entire estate of the decedent, with the exception of about two hundred dollars found outside of said District; and,

2. That said assets within the District of Columbia had been removed therefrom by Logan Bleckley, (one of the caveators,) claiming to act as administrator of the estate of said decedent, under grant of letters issued in May, 1896, by a court of the State of Georgia, pursuant to proceedings initiated in said court on April 6, 1896.

It is recited in the bill of exceptions that "to sustain the issues on their part joined," the caveators offered in evidence a certified transcript of record from the De Kalb Court of Ordinary, De Kalb County, in the State of Georgia. This record showed the appointment in May, 1896, of Logan Bleckley as administrator.

It is further recited in the bill of exceptions that the transcript referred to was offered as tending to show that the decedent had died a resident of De Kalb County, Georgia, intestate, "and that Mrs. Gordon was thereby estopped to deny that fact." The trial court, however, refused to admit the record in evidence, and an exception was duly taken to such refusal. The jury answered "Yes" to the first, third and fifth questions submitted to them, and "No" to the second and fourth questions, thus sustaining the contentions of Mrs. Gordon. The answers were certified to the Orphans' Court, and thereupon an order was entered admitting the will

to probate and record as the last will and testament of the decedent, and letters of administration *cum testamento annexo* were decreed to issue to Hugh H. Gordon, a son of the petitioner. An appeal was thereupon taken by the caveators to the Court of Appeals of the District of Columbia. That court affirmed the order of the lower court, (Mr. Chief Justice Alvey dissenting,) (13 App. D. C. 392,) and a writ of error was then sued out from this court.

Mr. Samuel F. Phillips for plaintiffs in error. *Mr. Frederic D. McKenney* was on his brief.

Mr. Charles Cowles Tucker and *Mr. Henry E. Davis* for defendant in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

Counsel for defendant in error urge in their brief an objection to the jurisdiction of this court, which we shall first consider and dispose of.

It is claimed that the writ of error should be dismissed "because the interests of the plaintiffs in error in respect of the judgment of the Court of Appeals of the District of Columbia, to which said writ of error was directed, are several, and the matter in dispute, exclusive of costs, as to no one of the said plaintiffs in error, exceeds the sum or value of five thousand dollars."

By act of February 9, 1893, c. 74, 27 Stat. 434, this court was authorized, among other things, to review a final judgment or decree of the Court of Appeals of the District of Columbia in any case where the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars. What, therefore, was the matter in dispute in this controversy? The answer manifestly is that it was whether an estate valued at more than nine thousand dollars should pass in the mode provided in an alleged last will and testament, which, in effect, excluded the next of kin of the decedent from the enjoyment of the principal of the

estate, or in the mode provided by the law of the domicil of the decedent for the transmission of an intestate estate. On the one hand was Mrs. Gordon, a sister of the deceased, and representing the interests under the alleged last will, asserting the validity of that document, and opposed to her were the plaintiffs in error, some of the next of kin of the deceased, interested in establishing his intestacy. Had the trial court admitted in evidence the transcript of record from the De Kalb court, and given it the conclusive force contended for, it would seem beyond question that as to those interested in upholding the validity of the alleged will, the value of the estate affected by that instrument would have been the matter in dispute. The matter in dispute necessarily must be the same as to the unsuccessful next of kin who are prosecuting this writ of error, and the amount of whose several interests in the estate of the decedent was not a question litigated below. The case is analogous in principle to that of *Shields* v. *Thomas*, 17 How. 3. In that case it was held that where the representatives of a deceased intestate recovered a judgment against an administrator for an amount in excess of the sum necessary to confer jurisdiction to review, and such recovery was had under the same title and for a common and undivided interest, this court had jurisdiction, although the amount decreed to be distributed to each representative was less than the jurisdictional sum. In the case at bar, the contestants below sought not an allotment to them of their interests, if any, in the estate, but an adjudication that the alleged last will and testament possessed no validity, and that contention was advanced by virtue of a claim of common title in the next of kin of the decedent to the *corpus* of the estate, such title, if any, being derived from the law of the alleged domicil of the deceased. In this aspect, the amount of the estate was the matter in dispute. *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 42, 51–52, and cases there cited. There is therefore no merit in the objection to the exercise of jurisdiction.

Coming then to the merits of the controversy, we find presented for our consideration the single question, Was the grant of letters of administration by the Court of Ordinary of De Kalb

County, Georgia, competent evidence upon the issue tried in the Supreme Court of the District of Columbia respecting the domicil of the decedent at the time of his death?

In determining this question it is important to keep in mind the following facts:

At the time when the proceedings before the De Kalb court were instituted, (April, 1896,) the estate of the deceased, with but a trifling exception, was within the District of Columbia. Not only this, but upon the ground that the domicil of Haralson at his death was the District of Columbia, the jurisdiction of a competent court of the District had been invoked as early as January 23, 1896, for the probate of an alleged last will and testament of Haralson and for the grant of letters of administration *cum testamento annexo;* and on March 6, 1896, the next of kin, other than the proponent of the alleged will, had filed a caveat in said court of the District of Columbia contesting the application for probate and grant of letters. Four days before the certification of issues framed by reason of such contest, to be tried before a jury, the caveators before the Supreme Court of the District of Columbia initiated the proceedings before the De Kalb County Court. It was upon the hearing had in the Supreme Court of the District of Columbia upon the issues certified on April 10, 1896, that the adjudication of the De Kalb County Court was offered in evidence upon the issue in respect to the domicil of the decedent at his death.

The transcript of record exhibiting such adjudication consists of: 1, an unverified petition of Logan Bleckley, as one of the next of kin and heirs at law of Hugh A. Haralson, asking that letters of administration be granted upon the estate of said deceased, upon the ground that he was a resident of the county of De Kalb at his death, and had died intestate, "leaving an estate, undevised, of real and personal property of the probable value of ten thousand dollars;" 2, consents of certain of the next of kin to the appointment of Bleckley; 3, the order of appointment; and, 4, the oath of office of the administrator, in which is embodied an averment that the decedent died intestate, so far as affiant knew or believed.

By section 3393 of the Georgia Code of 1895 an application

for grant of letters of administration was required to be made to the ordinary of the county of the residence of the deceased, if a resident of the State, and if not a resident, then in some county where the estate or a portion thereof was situated.

The next section, prescribing the notice to be given of an application, reads as follows:

"SEC. 3394. (2503.) *The citation.* The ordinary must issue a citation, giving notice of the application to all concerned, in the gazette in which the county advertisements are usually published, once a week for four weeks, and at the first regular term after the expiration of that time, the application should be heard or regularly continued."

The order of appointment is recited to have been made at the May term, 1896. It reads as follows:

"The petition of Logan Bleckley for letters of administration on the estate of Hugh A. Haralson, deceased, having been duly filed, and it appearing that citation therein was issued and published according to law, requiring all concerned to appear at this term and show cause, if any they could, why said letters should not be granted; and it also appearing that said deceased died a resident of said county, intestate, and that said applicant is a citizen of this State and lawfully qualified for said administration, and no objection being offered thereto, it is therefore ordered by the court that the said Logan Bleckley be, and he is hereby, appointed administrator on the estate of said deceased, and that letters issue to him as such, upon his giving bond, with approved security, in the sum of twenty thousand dollars, and taking and subscribing the oath as provided by law."

As said by this court in *Veach* v. *Rice*, 131 U. S. 293, courts of ordinary in Georgia are courts of record, having exclusive and general jurisdiction over the estates of decedents, and no question has been raised as to the observance of the requirements of the statutes of Georgia in the proceedings which culminated in the appointment of the Georgia administrator.

The transcript referred to, however, undoubtedly only justifies the inference that none other than the statutory notice by publication was given, and that no contest was had in respect to the grant of letters.

Opinion of the Court.

Jurisdiction is the right to hear and decide, and it must be exercised, speaking in a broad sense, in one of two modes — either *in rem* or *in personam.*

It will be observed that the statutory notice above referred to was not required to be directed against named individuals nor had it for its object the obtaining of specific relief against any one, but it was to be general, and its purpose was to warn all persons that it was proposed by the court of ordinary to determine whether a legal representative should be appointed to administer the property of the deceased within the State of Georgia. The notice and proceeding was obviously intended to have no greater force or efficacy against persons resident in the State of Georgia than against individuals who might be resident without the state. It results that the proceedings referred to were not intended to constitute and did not amount to an action *in personam.* This results from the fact that they were devoid of the elements essential to an action *in personam ;* and, if not proceedings purely *in rem*, they possessed so much of the characteristics thereof, as not to warrant the allowance of greater efficacy than is accorded to a proceeding of that nature.

An essential characteristic, however, of a proceeding *in rem* is that there must be a *res* or subject-matter upon which the court is to exercise its jurisdiction. In cases purely *in rem*, as in admiralty and revenue cases for the condemnation or forfeiture of specific property, a preliminary seizure of the property is necessary to the power of the court to adjudicate at all. In other cases, where the proceedings are in form *in personam*, but the court is unable to acquire jurisdiction of the person of the defendant, by actual or constructive service of process, the action may proceed, as one *in rem* against the property of which a preliminary seizure or its equivalent has been made; or, jurisdiction may be exercised without such preliminary seizure, where the relief sought is an adjudication respecting the title to or validity of alleged liens upon real estate situate within the jurisdiction of the court. *Roller* v. *Holly*, 176 U. S. 398. To the class of cases where the proceedings are in form *in rem* may be added those connected with the grant of letters either testamentary or of administration.

From the record of the proceedings instituted in the De Kalb County Court it is apparent that the ultimate purpose was to adjudicate upon and decree distribution of the estate of the deceased, the appointment of an administrator being a mere preliminary step in the management and control by the court of assets of the estate. The question of domicil would seem to have been important only as establishing the particular court of ordinary which was vested with jurisdiction to administer the assets within the State of Georgia. The subject-matter or *res*, upon which the power of the court was to be exercised, was, therefore, the estate of the decedent.

The sovereignty of the State of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the State. To quote the language of Mr. Chief Justice Marshall in *Rose* v. *Himely*, 4 Cranch, 241, 277:

"It is repugnant to every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*."

As said also in *Pennoyer* v. *Neff*, 95 U. S. 714, 722:

"Except as restrained and limited by the Constitution, the several States of the Union possess and exercise the authority of independent States, and two well established principles of public law respecting the jurisdiction of an independent State over persons and property are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . .

"The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. (Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2.) The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation out-

side of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunals.' Story, Confl. Laws, sect. 539."

Now, it is undeniable that the sovereignty of the State of Georgia and the jurisdiction of its courts at the time of the adjudication by the De Kalb County Court, by the grant of letters of administration on the estate of Haralson, did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia, and, viewed as a step in a proceeding *in rem* relating to property within the jurisdiction of the court, the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the State of Georgia. The decision in *Robertson* v. *Pickrell*, 109 U. S. 608, and in the cases there relied upon, furnish illustrations of this principle. Thus, in the case just named, it was held that the act of Congress declaring the force and efficacy which the records and judicial proceedings of one State should have in the courts of another State did not require that they should have any greater force and effect in another State than in the State where such records and judicial proceedings originated and were had; that the probate of a will in one State, by a proceeding not adversary in character, merely established its sufficiency to pass all property which could be transferred in that State by a valid instrument of that kind, and the validity of the will in that State; and that such probate did not conduce to establish the facts upon which the probate proceeded, in proceedings respecting real property situated in another State, except as permitted by the laws of such other State.

The reasoning upon which we base the conclusion that the transcript of record of the grant of letters by the De Kalb County Court was not entitled to probative force in the courts of another State in the controversy over the administration of assets not within the territorial jurisdiction of the State of Geor-

gia, at the time the grant of letters was made, finds support in the opinion delivered by Lord Blackburn in *Concha* v. *Concha*, 11 App. Cas. p. 541, a case referred to in terms of approval in *Thormann* v. *Frame*, 176 U. S. 350, where was involved a controversy in some of its features analogous to that presented in the case at bar. The facts in the *Concha case* were as follows:

After contest between a daughter of a decedent and the executors named in a document which purported to be a last will and testament, the paper was admitted to probate by a judge of a probate court in London, and he expressly decided, upon an issue framed in a contest between the daughter and executors as to the domicil of the decedent, in favor of the domicil being in England, and not in Chili, as was claimed by the daughter. In a subsequent action before the Court of Chancery for distribution of the assets, the daughter again sought to litigate the question as to the domicil of her father, and her right to do so was finally adjudicated by the House of Lords. The executors or those who had succeeded them in the management of the administration suit attempted to avail of the decree of the probate court as conclusive upon the question of domicil, first, as a proceeding *in rem*, which operated an estoppel against all the world; and, second, as a proceeding *inter partes*, operative as *res adjudicata*, by reason of the actual contest made by the daughter. The decree of the probate court, however, was held not conclusive *in rem* as to the domicil, because the finding as to domicil was not necessary to the decree of the judge of probate, nor conclusive *inter partes*, as the pending controversy was substantially between the daughter and the residuary legatee, and as the latter could not be bound by an adjudication upon a question not necessary to be litigated in the probate court, and as estoppels must be mutual, the daughter could not be bound. This decision of the House of Lords, it will be borne in mind, was as to the effect to be given in one judicial tribunal in England to the decision of another court of the same country. In the course of his opinion, Lord Blackburn (who perhaps had in mind doubts intimated in the Court of Appeals, 29 Ch. D. 268, 276, as to whether the findings on which a judgment *in rem* is based, are in all cases conclusive against the world) said (p. 562):

"What he (the Probate Judge) did decide was (and to that extent I think the decision was conclusive on everybody,) that there was an executor who was entitled to have probate in England for the purpose of getting in and taking the property which was in England, and to that he was entitled if there was a will which made that executor a good executor according to the law of England; but I do not think that Sir Creswell Creswell had any power to say that the testator was or was not really a domiciled Englishman. If he had been a domiciled American or domiciled in any other country, I do not think that a decision of the judge of our probate court, saying: 'I find him to be a domiciled Englishman, and, therefore, on that account grant probate,' would be at all conclusive upon the court of another country to oblige them to admit that he was a domiciled Englishman, when in fact he was not; or, putting it the converse way, that if a Chilian court had chosen to say that some very wealthy man was a domiciled Chilian, and had therefore granted probate, the law of nations would require that to conclude any person from saying in this country that he was not so."

Again, after referring to the fact that upon the executor proposing to prove the will, a caveat was entered upon which it was said the probate judge entered into an inquiry whether or not the testator was domiciled in England, and found that he was, Lord Blackburn observed (p. 564):

"It is said that upon the caveat in the suit an order was drawn up, which may perhaps not mean that, but which does look extremely as if the registrar entered the judgment that the judge did find it. I cannot think that if he had done that it would have bound everybody universally as being a judgment *in rem*. I have instanced a sort of illustration of it. Supposing he had done so, and supposing that he was wrong, and the fact was that the testator had not been really domiciled in England, but had been domiciled, say, in the United States, in New York we will suppose, could it possibly have been said that the court of New York (which undoubtedly would have the same general law of nations as we have, following the law of the domicil to distribute the property) would have respected the decision of the Judge Ordinary, it establishing that this

will was proved conclusively as being enough to make this person executor and the representative in England to obtain the English property—could it have been said that the Judge Ordinary having erroneously found that the testator was domiciled in England when in fact he was a domiciled citizen of the United States, it was to conclude them and conclude everybody to the fact that he was a domiciled Englishman until a foreigner had come to the court of this country to obtain a reversal? I cannot think so. If that was so, how could it as a matter *in rem* be decisive as regards the reason upon which the judge of the probate court had gone? I cannot think that it would be."

In *Blackburn* v. *Crawford's Lessee*, 3 Wall. 175, and a continuation of the same action under the title of *Kearney* v. *Denn*, (15 Wall. 51,) the sole question at issue in the action (ejectment) was the validity of an asserted marriage. At the trial the defendant offered in evidence, as a conclusive estoppel against all the lessors of the plaintiff and as *prima facie* evidence to support the issue on his part, a transcript from the records of the Orphans' Court of Prince George's County, Maryland, and proposed to read therefrom the verdict of the jury and the order of the Orphans' Court thereon on certain issues sent from the Orphans' Court to the Circuit Court of said county. These issues had been framed upon a contest, initiated in the Orphans' Court, by one of the lessors of the plaintiff who resisted an application of Blackburn for the grant to him of letters of administration on the estate of a certain intestate, such lessor asserting that he was nearest of kin to the intestate, and that letters should be granted to him. The verdict in the contest was against the validity of the claimed marriage. On the trial in the action in ejectment the jury found in favor of the fact of marriage. This court—the trial judge in the action in ejectment having excluded the transcript referred to—held that the decree upon the contest was competent evidence and operated an estoppel as against the lessor of the plaintiff who was a party to the contest, but that the adjudication did not affect the other lessors, who were not parties to such contest. Obviously, the decision proceeded upon the assumption that as the Orphans' Court possessed no general jurisdiction over the real

estate of a decedent, its action upon the application for grant of letters, regarded as a proceeding *in rem*, possessed no probative force in contests over such property. This, of course, in nowise impugned the principle that all parties to a contest, in proceedings in a probate court preliminary to and during the course of administration upon the estate of the decedent, upon a matter within the jurisdiction of the court, are concluded in every other court by the decision rendered, as to the facts upon which such decision necessarily proceeded. *Caujolle* v. *Ferrié*, 13 Wall. 465. And see *Butterfield* v. *Smith*, 101 U. S. 570.

We are of the opinion that the De Kalb County Court possessed the power to determine the question of domicil of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicil, by a mere finding of such a fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such contest as to facts which had been or might have been litigated in such contest.

Our conclusion being that the adjudication of the fact of domicil in Georgia made in the grant of letters by the De Kalb County Court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicil in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the Supreme Court of the District did not err in excluding the transcript in question, whether tendered as evidence conducing to establish or as conclusively fixing the domicil of the deceased. And this conclusion is not affected in the least by the circumstance that on the trial of the issue as to domicil had in the Supreme Court of the District of Columbia it was claimed that the assets within the District of Columbia at the time of the filing of the caveat by the next of kin had been thereafter, without the sanction of the court, removed from the District of Columbia by one of the caveators,

The trial court properly declined to rule that delivery of such assets operated to protect those who made the surrender, as against an administrator appointed within the District, subsequent, it is true, to such delivery, but as the result of proceedings for the appointment of an administrator which were pending in a proper court of the District at the time of the delivery and when the person in whose name the Georgia letters were issued was a party to the proceedings previously instituted and then pending in the District. Nor was the trial court required to determine that upon proper application to the Georgia court the administrator appointed by the court would not be ordered to deliver up the assets removed by him from the District.

Allusion has been made to an act of Congress of February 28, 1887, c. 281, 24 Stat. 431, which makes its lawful for any person or persons to whom letters testamentary or of administration may be granted by proper authority, in any of the United States or the territories thereof, to maintain any suit or action and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said District. We do not construe that statute, however, as having any relation to a case of the kind we are now considering. In other words, the statute cannot in reason be interpreted as directing that where a proper court of the District of Columbia had obtained jurisdiction by proceedings commenced before it for administration upon property within the District, it should be obliged to dismiss such proceedings because one who was a party before it chose, whilst issues in such proceedings were pending and undecided, to go to a State and there make application for letters of administration, basing such application upon the asserted fact that the deceased had been domiciled in such State.

Whilst it may be conceded that, in consequence of the statute, as a general rule, a debtor residing in the District of Columbia, of a deceased person, may be protected in making payment to an administrator appointed in another jurisdiction, the asserted domicil of the deceased, *Wilkins* v. *Ellett*, 108 U. S. 256, this does not make it necessary for us to decide that the payment

or delivery of the assets in the District of Columbia, which was made to the Georgia administrator after the commencement of proceedings for the administration of the assets within the District of Columbia, based upon the ground of the domicil of the deceased having been in said District, was lawful. To determine this question would involve a consideration of other provisions of the statute, and as to whether the person making the payment was or not to be charged with notice of the then pending proceedings in the Supreme Court of the District, which, of course, were matter of public record. The question, however, is not before us for review, and we do not, therefore, express an opinion in regard thereto.

Further, in the light of the decision of the Supreme Court of Georgia in the case of *Thomas* v. *Morrisett*, 76 Georgia, 384, and an analogous decision by the Supreme Court of Errors of Connecticut, in *Willett's Appeal from Probate*, 50 Conn. 330, it would seem altogether probable that the De Kalb County Court, upon application made to it, will order its appointee to surrender to the administrator appointed in the District of Columbia the assets which were by the former removed from the District during the pendency therein of the proceedings for administration.

Finding no error in the record, the judgment of the Court of Appeals of the District of Columbia is

Affirmed.

Mr. Justice Brown concurred in the result.